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## CISG ARTICLE 6 AND ISSUES OF FORMATION: THE PROBLEM OF CIRCULARITY

*CISG Article 6 broadly allows parties to exclude the application of the CISG or derogate from its provisions. The application of Article 6 is relatively straightforward when addressing the rights and obligations of the parties, but encounters a challenge of circularity when addressing issues of contract formation. How can the parties agree to exclude or derogate from the application of the CISG if it is not yet clear whether they have agreed to anything at all?*

*This article explores this narrow, but important question. Can the parties effectively exclude the application of the CISG or derogate from its provisions (i.e., “opt out”) on contract formation within the agreement for which contract formation is at issue? The article begins with a brief elaboration on the nature of the problem, suggests a means of resolving this issue by looking to the general principles underlying the CISG, and then applies those principles to a series of hypothetical formation problems.*

Key words: *Article 6. – Opt out. – Formation. – Separability.*

### 1. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) governs contracts for the sale of goods between parties from different CISG contracting states,<sup>1</sup> as well as contracts where the rules of private international law lead to the application of the law of a contracting state.<sup>2</sup> However, CISG Article 6 allows parties to

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods (1980) (the “CISG”) Article 1(1)(a).

<sup>2</sup> CISG Article 1(1)(b).

exclude the application of the CISG or derogate from any of its provisions.<sup>3</sup> The application of Article 6 to Part III of the CISG is relatively straightforward. Having concluded a contract, the parties may further agree that such contract will not be governed by some or all of the provisions of the CISG addressing: general provisions; obligations of the seller; obligations of the buyer; passing of risk; and provisions common to the obligations of the seller and of the buyer.<sup>4</sup> The application of Article 6 is not, however, quite so straightforward when addressing issues of contract formation under Part II of the CISG. The problem, of course, is one of circularity.<sup>5</sup> How can the parties agree to exclude or derogate from the application of the CISG if it is not yet clear whether they have agreed to anything at all?

This article explores this narrow, but important question. Can the parties effectively exclude the application of the CISG or derogate from its provisions (i.e., “opt out”) on contract formation within the agreement for which contract formation is at issue? Which law governs the formation question—the CISG or the chosen law (that chosen in lieu of the CISG under Article 6)? The article begins with a brief elaboration on the nature of the problem (Part 2), suggests a means of resolving this issue by looking to the general principles underlying the CISG (Part 3), and then applies those principles to a series of hypothetical formation problems (Part 4).

## 2. THE NATURE OF THE PROBLEM

When addressing the rights and obligations of the parties, one is presuming the existence of a contract. Thus, a clear and unequivocal provision of the contract opting out of the CISG under Article 6 may be given effect without difficulty. In contrast, a contract provision attempting to opt out of the CISG on issues of formation, governed by Part II of the CISG, presents a problem of circularity. Which comes first, the proverbial “chicken or egg”? If one gives effect to the “opt out” provision,

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<sup>3</sup> See CISG Article 6, which is limited only by Article 12, relating to certain state reservations of writing requirements.

<sup>4</sup> See CISG Articles 25 through 88.

<sup>5</sup> See J. Honnold, H. M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2009<sup>4</sup>, 199. As Professor Flechtner explains, the problem is easily avoided by a “pre-sale framework agreement” or any other agreement predating the one for which formation is at issue. However, if the provision attempting to exclude or derogate from the application of the CISG is contained within the very contract for which formation is at issue, the challenge of circularity is squarely presented. Professor Flechtner’s thoughtful questions (both in person and in his treatise) served as the inspiration for this article. Any flaws in the analysis that follows are, however, entirely my own.

one must, at the very least, presume that a contract has been concluded in order to decide whether a contract has been concluded.<sup>6</sup> Moreover, if one decides that a contract was not concluded, what is left of the “opt out” provision? In contrast, if one decides the formation issue based on the CISG, then has not the parties’ intent been ignored?

There is of course no issue when the “opt out” provision predates the contract for which formation is at issue, because it is not in any way dependent on the formation of the later agreement.<sup>7</sup> Contracting States may also avoid the application of Part II by making a reservation under CISG Article 92. Inasmuch as such a “reservation” becomes part of the background default law, and again pre-exists the agreement for which formation is at issue, there is no problem of circularity. Thus, the problem at hand is limited to provisions within the contract at issue attempting to “opt out” of the CISG on issues of contract formation.

The legislative history of the CISG also reflects concerns over this issue. There was no question that Article 6 applied to Part II of the CISG—as long as the agreement to “opt out” predated the formation issue in question. However, it was somewhat less clear whether parties could “opt out” in the same agreement subject to the formation dispute. The final text of the CISG came about through the consolidation of the draft convention on “Formation” and the draft convention on “Sales.”<sup>8</sup> Opting out of the draft Sales Convention was a relatively simple matter, inasmuch as the Sales Convention presumed a contract had been concluded.<sup>9</sup> In contrast, opting out of the draft Formation Convention raised the potential issue of circularity described above. Article 2 of the Formation Convention provided that the parties may “‘agree to’ exclude, derogate from or vary” the Convention, which arguably required such agreement prior to any substantive formation negotiations at issue.<sup>10</sup> This language was excluded from CISG Article 6, because the drafters did not want to

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<sup>6</sup> This is often characterized as “bootstrapping.” Logic would suggest that, no matter how hard one might try, one cannot lift one’s self by one’s own bootstraps. But see R. E. Raspe, *The Surprising Adventures of Baron Munchausen*, 1785 (in which the hero pulls himself from the swamp by his own pigtail).

<sup>7</sup> For example, a manufacturer and distributor may conclude a “framework agreement” governing their distribution relationship and “opting out” of the CISG with respect to individual agreements for the sale of specific goods.

<sup>8</sup> See J. Honnold, H. M. Flechtner, 7–8.

<sup>9</sup> See Report of the Secretary General: incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods, UNCITRAL, para 34, U.N. Doc. A/CN.9/145 (1978), reprinted in [1978] IX Y.B. U.N. Commission on International Trade Law 123 (“Convention Incorporation Report”).

<sup>10</sup> See M. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, *Virginia Journal of International Law* 37/1996, 148.

preclude implied exclusion, and it was arguably superfluous—the necessity of agreement being understood.<sup>11</sup>

The draft Formation Convention also provided for a more elaborate provision on opting out of the Convention, reflecting the circumstances of formation. The parties' agreement to opt out might, *inter alia*, “appear from the negotiations, the offer or the reply, ...”.<sup>12</sup> There was strong support for the right of the offeror to limit any acceptance to the terms of the offer, including any provision opting out of the Convention. However, there was much less support for any unilateral right of the offeree to do so in a purported acceptance.<sup>13</sup> In view of these and other potential difficulties in applying the same set of “opt out” rules to issues of formation as one might apply to concluded contracts, it was suggested that two separate provisions might be preferable—one governing formation, and one governing all other attempts to opt out of the CISG.<sup>14</sup> However, it was ultimately decided to address the issue of excluding, derogating from, or varying the effects of the CISG in a single sentence,<sup>15</sup> leaving a simple and elegant statutory provision, but one that does not clearly and unequivocally answer the question at hand.

### 3. INTERPRETING CISG ARTICLE 6 BASED ON GENERAL PRINCIPLES

While Article 6 certainly governs the issue, its language does not directly answer whether parties may invoke its provisions in an agreement, itself subject to a question of formation. Inasmuch as the issue is one “governed,” but not “expressly settled” by Article 6, CISG Article 7(2) directs us to examine the general principles upon which the Convention is based. In looking at the instant question, we find two relevant principles—the principle of the primacy of party autonomy (Part 3.1) and the principle of separability (Part 3.2). In formulating our approach to examining this issue under CISG Article 6, it may also be useful to consider the analogous principles of competence-competence and separability in arbitration (Part 3.3).

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<sup>11</sup> See Convention Incorporation Report, *supra* note 9, para. 35, at 123.

<sup>12</sup> Report of the United Nations Commission on International Trade Law on the work of its eleventh session (New York, 30 May–16 June 1978), Annex I, Summary of deliberations of the Commission on the draft Convention on the Formation of Contracts for the International Sale of Goods, UNCITRAL, para 7, U.N. Doc. A/33/17 (1978), reprinted in [1978] IX Y.B. U.N. Commission on International Trade Law 32 (“Convention Incorporation Deliberations Summary”).

<sup>13</sup> *Id.*, para 8 and 9, at 32.

<sup>14</sup> See Convention Incorporation Report, *supra* note 9, para. 38 and 39, at 123.

<sup>15</sup> See Convention Incorporation Deliberations Summary, *supra* note 12, para. 16, at 32.

### 3.1. The Principle of the Primacy of Party Autonomy

The very nature of the CISG is one of default rules subject to the autonomous will of the parties. This general principle of party autonomy is expressed nowhere more clearly than in Article 6, itself.<sup>16</sup> With only a very few narrow exceptions,<sup>17</sup> the parties are free to craft their own rules to govern their relationship. As such, this general principle of the primacy of party autonomy provides strong support for the idea of giving effect to the parties' attempts to opt out of the CISG—wherever such attempts may be found. However, the principle of party autonomy does not answer the theoretical challenge presented when a purported agreement containing the “opt out” provision fails the formation analysis. For that, we must look to the principle of separability.

### 3.2. The Principle of Separability

The principle of separability is generally associated with arbitration agreements.<sup>18</sup> However, this same principle is also found within the CISG. Article 81 states that any provision for “resolution of disputes” survives the remedy of avoidance.<sup>19</sup> Provisions for resolution of disputes would “normally include choice of law clauses” among those surviving avoidance under Article 81,<sup>20</sup> and an “opt out” provision is, essentially, a “choice of law” provision. Thus, the general principle reflected in the survival of dispute resolution provisions under Article 81 suggests the idea that such dispute resolution provisions, including “opt out” provisions, should be treated as autonomous and separable from the agreement within which they are contained.

### 3.3. An Arbitration Analogy

A similar issue arises in the context of a disputed arbitration agreement. To some degree, one must presume an agreement if the parties are to avoid a preliminary detour to court for a determination of whether they agreed to arbitrate. The doctrine of competence-competence allows the arbitrators to decide their own jurisdiction, thus giving effect to the parties' likely intent.<sup>21</sup> Moreover, the doctrine of separability provides that an arbitral tribunal's authority to decide the merits of the parties' dispute

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<sup>16</sup> See M. Van Alstine, 35–41.

<sup>17</sup> See, e.g., CISG Article 12.

<sup>18</sup> See, e.g., G. B. Born, *International Commercial Arbitration*, 2009, 311–312.

<sup>19</sup> Avoidance normally releases the parties from their remaining contract obligations, subject only to the narrow set of exceptions listed in Article 81.

<sup>20</sup> CISG Advisory Council Opinion No. 9, *Consequences of Avoidance*, 3.3 (2008).

<sup>21</sup> See, e.g., G. B. Born, 855–56.

will generally survive a negative decision on the validity of the primary contract in question.<sup>22</sup> By analogy, we should attempt to give effect to the parties' intent to "opt out" of the CISG on issues of formation by deciding the question in accordance with the parties' chosen law or rules of law, and a negative decision on formation of their primary contract should not affect the viability of that choice.

We can combine these two foregoing general principles, along with the arbitration analogy, as follows. We should attempt to give effect to party intent to "opt out" of the CISG and decide formation under rules other than those contained in Part II. To the extent we find such intent, we should treat an "opt out" provision as an autonomous and separable agreement. Thus, a failure to conclude the main contract should not affect the "opt out" provision, unless such failure is specifically caused by the act of adding the provision. Having formulated an approach to the problem, we can now turn to its application.

#### 4. A FEW HYPOTHETICAL APPLICATIONS OF THESE PRINCIPLES

The variety of possible formation scenarios in which this problem might arise is endless, and any attempt to survey them all would go far beyond the scope of this brief article. However, one might reasonably attempt to organize this broad set of possibilities into three basic categories—traditional "offer and acceptance" based on discrete communications of each (Part 4.1), a more protracted and less discrete set of negotiations, during which contract terms evolve as part of the negotiation and formation process (Part 4.2), and the classic "battle of forms" formation scenario (Part 4.3). By organizing our hypothetical applications as such, we can attempt to develop our analytical model further based on its actual application. Before doing so, however, it's worth taking a more detailed look at the issue of "intent" and a few potential approaches to ascertaining that intent.

If both parties agree that they "opted out" of the CISG under Article 6, then the general principles of party autonomy and separability would suggest that a tribunal simply apply the parties' choice and give it effect—whatever the outcome. However, if the parties are disputing formation, they are also likely disputing whether they agreed to the "opt out" provision. How does one ascertain party intent with respect to an individual provision within a disputed contract—even if it is separable from the main contract? One easy answer might be simply to apply the interpretive rules of Articles 8 and 9. However, the parties might well have "opted out" of their application as well, and their use in addressing the

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<sup>22</sup> See, e.g., *ibid.*, 313.

issue of formation seems inconsistent with the parties' attempt to "opt out" of the CISG with respect to that issue. Thus, we are left to search for broader principles that may be useful in our analysis.

One suggested approach would be to favor the intent of the offeror, as "master of the offer".<sup>23</sup> While the very nature of the process of contract formation will sometimes make it difficult to determine which party is the offeror and which the offeree, this offeror-centric approach may be useful in some circumstances. However, we may want to consider other possible approaches as well. We might look to one or more of the following in deciding whose intent should control:

- Favor the intent of the offeror
- Presume a mutual intent to "opt out" absent any objection to such a provision introduced by either party
- Favor application against the party introducing the "opt out" provision
- Favor the intent of the party asserting any agreement to "opt out"
- Favor the intent of the party challenging any agreement to "opt out"
- Apply a presumption in favor of or against formation of the main agreement

This article will not suggest that any of these presumptions be given dominant effect, but merely that each may influence our analysis to some extent, depending on the circumstances in which the issue arises. In short, the author will suggest that a single "bright line" rule is elusive, and a more circumstantial approach to this particular challenge is appropriate.

Finally, a hypothetical "opt out" choice must be selected. For the sake of simplicity, this hypothetical analysis will rely on a single body of law<sup>24</sup> as an alternative to the CISG—UCC Article 2, as supplemented by typical U.S. common law.<sup>25</sup> In contrast to the CISG, this substituted body of law:

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<sup>23</sup> See discussion *supra* Part 2, fn. 13; see also J. O. Honnold, H. M. Flechtner, 199 (generally suggesting a more favorable view of an offeror's attempt to "opt out" in the offer, as compared to any unilateral attempt by the offeree to "opt out" in any purported acceptance).

<sup>24</sup> "Opting out" of the CISG does not of course rely on choosing an alternative body of law, as the parties may also simply agree to derogate from or vary the effects of the CISG by contract. This analysis, however, shall focus on the substitution of another body of law for the CISG.

<sup>25</sup> Unlike the CISG, most contract law in the United States is state law. For our purposes here, however, we can reasonably rely on the uniform version of UCC Article 2



- Assigns the risk of failed transmission to the offeror if acceptance is dispatched in the manner invited by the offer;<sup>26</sup>
- Allows for revocation of offers, unless very specific statutory requirements are met, including a requirement of a signed writing promising to keep the offer open;<sup>27</sup>
- Allows formation with an “open price term” and fills the gap with a reasonable price;<sup>28</sup>
- Requires a writing signed by the party against which enforcement is sought;<sup>29</sup> and
- Allows formation based on an acceptance containing material variances from the offer.<sup>30</sup>

These five legal principles will be employed in the analysis of the five factual hypotheticals that follow. In each hypothetical, the parties are from the U.S. and Germany, two CISG contracting states. Thus, the CISG would govern any issue of formation absent an effective agreement opting out of the CISG’s provisions on formation pursuant to Article 6.

#### 4.1. Attempted Formation Based on a Traditional Offer and Acceptance Paradigm

Two issues that often arise under the traditional offer and acceptance paradigm involve the actual receipt of any exchange of communications and the effect of an attempt by the offeror to revoke the offer. Here, we will analyze a purported acceptance lost in transmission (Part 4.1.1) and an attempted revocation contrary to an oral promise (Part 4.1.2).

##### *4.1.1. Acceptance Lost in Transmission*

A U.S. buyer mails an offer to a German seller, which includes a choice of UCC Article 2 (and associated state common law) to govern all issues, including formation. Seller mails an acceptance, which is lost in the mail and is never received by the U.S. buyer. Assuming that a tribunal believes that the seller actually dispatched the acceptance by mail, can the seller enforce?

(without the 2003 amendments, which have been uniformly rejected by the states), as supplemented by a relatively uniform body of state common law on the issues addressed.

<sup>26</sup> See Restatement (Second) of Contracts § 63(a) (1980) (this is often referred to as the “mailbox rule”), supplementing UCC Article 2, as provided in UCC 1–103(b) (as revised 2001); *compare* CISG Article 18(2).

<sup>27</sup> See UCC 2–205; *compare* CISG Article 16(2).

<sup>28</sup> See UCC 2–305; *compare* CISG Article 14(1).

<sup>29</sup> See UCC 2–201; *compare* CISG Article 11.

<sup>30</sup> See UCC 2–207; *compare* CISG Article 19.

CISG Article 18(2) would answer this question in the negative, because seller's acceptance never reached the buyer. However, the U.S. common law "mailbox rule" would give effect to seller's acceptance dispatched in a reasonable manner under the circumstances (in the same manner as the mailed offer)—irrespective of the fact that it failed to arrive.<sup>31</sup> The U.S. law effectively places the risk of a failed transmission of the acceptance on the offeror under this circumstance and, therefore, would find that these parties concluded a contract.

Under these circumstances, it would seem quite reasonable to give effect to the choice of UCC Article 2 and associated common law. First, the buyer, who introduced the "opt out" provision, is clearly the offeror, so terms of the offer are respected. Second, the seller is simply enforcing against the buyer under the buyer's own choice of law provision, so each party has, at some point, consented to this provision. Finally, the "opt out" provision results in the enforcement of the contract within which the provision is contained, so there is no issue regarding the survival of this clause independent of the main contract.

#### *4.1.2. Revocation Contrary to an Oral Promise*

A U.S. seller makes an oral telephone offer to a German buyer, promising to keep the offer open for ten days and further stating that the offer is governed by UCC Article 2. Three days later, the seller telephones the buyer and revokes. Immediately after the seller's purported revocation, the buyer purports to accept seller's offer. Can buyer enforce?

CISG Article 16(2)(a) would answer this question in the affirmative, because seller has indicated, by orally promising to keep the offer open for ten days, this the offer is irrevocable for that period. Thus, seller's purported revocation would be ineffective, and buyer's acceptance would conclude a contract. However, the U.S. common law provides that offers for the sale of goods are freely revocable, unless the strict standards of UCC 2-205 are met. These standards require a signed writing,<sup>32</sup> so seller's oral promise to keep the offer open has no effect on seller's common law right to revoke. Seller's revocation is, therefore, effective, and the parties have failed to conclude any agreement.

Like the example in Part 4.1.1 above, the application of the "opt out" choice again allows the offeror to retain mastery over its offer including the provision. However, this hypothetical presents two challenges not present in the earlier one. First, the seller is relying on its own "opt out" provision, so we cannot rely on the other party's current assertion of

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<sup>31</sup> See Restatement (Second) of Contracts § 63(a) (1980).

<sup>32</sup> See UCC 2-205 ("[a]n offer ... in a signed writing which by its terms gives assurance that it will be held open ... is not revocable ...").

the provision for consent. However, the buyer's belated attempt to accept the offer made no attempt to vary from the terms of the offer, so the buyer has arguably agreed to have the effectiveness of any purported acceptance determined in accordance with the offeror's choice of Article 2. Second, this hypothetical requires us to resort to the concept of separability to insure the survival of the "opt out" provision. Inasmuch as the choice of Article 2 results in a failure to form the main contract, the "opt out" provision would, itself, be without effect absent our separate treatment of that provision. We, essentially, find agreement to the "opt out" provision and give it autonomous effect in finding a failure to form the main contract, the demise of which has no impact on the separable "opt out" provision.

#### 4.2. Attempted Formation Through a Process of Negotiation of Contract Terms

In the context of protracted negotiations towards possible contract formation, two issues that will often arise are the questions of whether a contract may be concluded without express or implied agreement on essential terms and whether a contract may be concluded without certain formalities, such as a signed writing. Here, we analyze the potential conclusion of contracts with an open price term (Part 4.2.1) and without any signed writing (4.2.2).

##### *4.2.1. Contract with an Open Price Term*

A U.S. buyer sends a lengthy and detailed proposed contract to a German seller, including a provision opting out of only Part II of the CISG and, instead choosing Article 2 on issues of contract formation.<sup>33</sup> The seller marks up language of the buyer's original proposal and returns the "edited" contract proposal to the buyer. However, the seller does not change or comment upon the provision choosing Article 2. After a few additional exchanges of such "edits," the parties agree on all of the terms, except price, and orally agree to the "basic deal." The parties further agree to work out a final price at a later date. Can either party walk away at this point (prior to deciding on the price) without being bound to a contract?

The CISG would likely answer each of these questions affirmatively, finding that the parties have failed to conclude a contract under Article 14(1), which arguably requires that any offer "expressly or implicitly fix[] or make[ a] provision for determining . . . the price".<sup>34</sup> In

<sup>33</sup> In this particular hypothetical, the author does not wish to raise the issue of form, which is addressed in the next hypothetical.

<sup>34</sup> Admittedly, there are differing views as to whether Article 14(1)'s treatment of price represents a limitation or a safe harbor (if the former, a failure to provide for price

contrast, UCC 2–204 requires only bare agreement to contract,<sup>35</sup> and the lack of any requirement of an agreement on price is confirmed by UCC 2–305.<sup>36</sup> Thus, any application of UCC Article 2 to the question of formation would likely find the parties have concluded a contract based on their agreement to the “basic deal”.<sup>37</sup>

In this sort of “back and forth” negotiation process, it is hard to identify either party as the offeror, so this factor may be somewhat less useful at first blush. However, to the extent we treat the “opt out” provision as separable and autonomous from the main agreement, we can in fact identify the U.S. buyer as the offeror of this specific provision. However, having separated the “opt out” provision from the main contract, one might arguably look for separate consent to this provision, which would likely require us to consider tacit or silent acceptance. While neither CISG Article 18(1), nor the U.S. common law<sup>38</sup> provide that silence, by itself, amounts to acceptance, such silence may amount to tacit acceptance if justified by the objective circumstances. In the context of the sort of detailed negotiations present here, each party has the opportunity to object to individual provisions with which it does not agree—and does so in a number of instances. Thus, a party’s failure to object to the “opt out” provision can reasonably be treated as more than mere silence and as a tacit agreement to the term by failing to object to its inclusion. The application of the choice of Article 2 also seems to give effect most accu-

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precludes formation, whereas the latter leaves the door open to the extent intent can otherwise be established). See J. O. Honnold, H. M. Flechtner, 210–211 (suggesting a more “open ended” approach to the application of Article 14, but also noting the late Professor Schlechtriem’s more traditional view of Article 14’s price requirement as an absolute limit absent derogation under Article 6). This article takes no position on which of these views provides the most appropriate interpretation of CISG Article 14. However, for purposes of this particular example—and its focus on “opting out” on issues of formation—the author will adopt the view that Article 14 represents a limit on the parties’ agreement to contract without providing a price. Thus, a failure to agree in some manner on a price would preclude formation to the extent governed by CISG Part II.

<sup>35</sup> “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” UCC 2–204(1).

<sup>36</sup> “The parties if they so intend can conclude a contract for sale even though the price is not settled.” UCC 2–305(1).

<sup>37</sup> While Article 2 would govern formation, the limited nature of the provision “opting out” of only Part II of the CISG would likely lead to the application of CISG Article 55 of supply a price based on “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned”. Compare UCC 2–305(1)(b) (supplying a “reasonable price at the time of delivery” under these same circumstances).

<sup>38</sup> See Restatement (Second) of Contracts § 69 (1980) (providing for acceptance via silence only in limited circumstances).

rately to the parties' mutual intent to conclude a contract—notwithstanding their lack of an agreement on price.<sup>39</sup>

#### 4.2.2. *Contract without a Signed Writing*

A U.S. seller and German buyer negotiate terms of a possible contract at a trade show. During negotiations, the U.S. seller says Article 2 must fully govern any transaction, and German buyer says nothing in response to this statement. After lengthy negotiations, the parties reach an oral agreement on a sale of a specific quantity of specific goods at a price of \$3,000. When they walk away, the buyer thinks they have a contract, while the seller does not. Assuming a tribunal believes that the parties formed a contract—whether governed by the CISG or Art 240—what is the effect of seller's apparent attempt to “opt out” of CISG Part I?

This hypothetical involves an attempt to “opt out” of CISG Part I instead of Part II, but nonetheless raises similar issues. CISG Article 11 provides that a contract may be concluded orally, so the lack of a writing signed by the parties would have no effect on their agreement. However, UCC Article 2 includes a “statute of frauds” precluding enforcement of this agreement in the absence of a writing signed by the party against who enforcement is sought<sup>41</sup>—in this case, the seller. Thus, Article 2 would preclude enforcement against seller, even if a tribunal determined that the parties had concluded a contract.

Much of the same analysis addressed in Part 4.2.1 would also apply here. However, the “opt out” clause leaves the parties without an enforceable contract—notwithstanding any objective manifestations suggesting a mutual intent to be bound. While the proper result here seems somewhat less clear than that in the prior example, the application of the form requirement of UCC Article 2 may yet be justified by virtue of its inclusion by the offeror of that specific separable, autonomous term. Having limited the offer to the requirements of Article 2, including its form requirements, the offeror indicated an unwillingness to be bound unless those requirements were met.<sup>42</sup> This fact, coupled with the offeror's sub-

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<sup>39</sup> Moreover, giving effect to the parties' agreement to “opt out” of CISG Part II seems far more consistent with the language of Article 6 than any attempt to employ Article 55 to supply a price under circumstances in which formation is governed by CISG Article 14.

<sup>40</sup> Either the CISG or UCC Article 2 would seem to lead to a finding that these parties concluded an agreement, as long as the objective manifestations of the parties suggested they intended a contract—whatever seller's subjective view to the contrary.

<sup>41</sup> UCC 2–201(1) (requiring such a signed writing with any transaction in goods for a price of \$500 or more). UCC 2–201 also includes a plethora of exceptions in subsections (2) and (3); however, none are triggered by the facts presented here.

<sup>42</sup> The drafting history of Article 6 further supports this idea, suggesting that “as a minimum, an offeror should be able to stipulate that an acceptance must be in writing.” See Convention Incorporation Deliberations Summary, *supra* note 12, para. 8, at 32.

jective belief that a contract had not been concluded,<sup>43</sup> would seem to support the resulting failure to bind the parties under UCC Article 2.

#### 4.3. Attempted Acceptance of an Offer in Which the “Opt Out” provision is Included Only in One of the Two Parties’ Communications

One of the most challenging formation issues in any legal system involves the issue of a purported acceptance that varies in some manner from the offer. Two issues typically arise in this “battle of forms” scenario. First, does the purported acceptance, which varies from the offer, effectively serve as an acceptance so as to conclude the parties’ agreement? Second, if the parties do conclude an agreement, what are its terms? The issue of formation focuses on the former, and that is the primary focus of our analysis here. However, we will also need to address the latter, as explained below.

A German buyer sends an offer to a U.S. seller, which says nothing about choice of law. The seller sends a purported acceptance, which includes a provision choosing UCC Article 2. One party then wants out of the deal before any further communication or conduct, and so notifies the other party. Can buyer enforce if seller wants out? Can seller enforce if buyer wants out?

CISG Article 19 would answer both questions “no,” neither party can enforce, because the seller’s purported acceptance included the provision opting out of the CISG and choosing UCC Article 2. Such a provision is undoubtedly material under CISG Article 19(3)<sup>44</sup> and would therefore result in a counter-offer by the seller under Article 19(1)—not an acceptance. Without further conduct or communications, there would be no contract. In contrast, seller’s acceptance would be given effect as such under UCC 2–207(1), and the parties would be bound to a contract. UCC 2–207(1) allows an expression of acceptance to function as such, even if it contains additional terms—irrespective of the materiality of those terms. The materiality of an additional term may determine whether that specific term is included in the parties’ agreement,<sup>45</sup> but it has no effect on the conclusion of the agreement as a whole.<sup>46</sup> However, the determina-

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<sup>43</sup> One of the notable exceptions to UCC 2–201, essentially, provides that a party cannot admit that it concluded a contract, while simultaneously attempting to assert a statute of frauds defense. *See* UCC 2–201(3)(b).

<sup>44</sup> The “non-exclusive” list of “material” terms includes those relating to the “settlement of disputes,” which would certainly seem to include a provision opting out of the CISG as the law applicable to settlement of such disputes. *See supra* note 20 and accompanying text.

<sup>45</sup> *See* UCC 2–207(2)(b) (providing that a material additional term will not become part of the contract).

<sup>46</sup> *See* UCC 2–207(1).

tion of materiality in this case may yet have significance to the issue of formation, because if the “opt out” provision is material, then it cannot be deemed part of the parties’ agreement.<sup>47</sup>

While CISG Article 19(3) provides significant guidance as to the “materiality” of an additional term in an offer, UCC 2–207 provides little guidance other than a standard involving unreasonable surprise or hardship,<sup>48</sup> which is largely a fact based inquiry. If a tribunal were to determine that “opting out” of the CISG was in fact a common practice,<sup>49</sup> then it might also find the term to be non-material.<sup>50</sup> If so, then it would be deemed part of the parties’ agreement concluded by the seller’s acceptance. As such, it would control the question of whether the contract had been concluded and would answer that question affirmatively.

This result seems correct if one applies the law chosen by the parties, and it seems intuitively correct as well to allow the German buyer to enforce an agreement arising from the U.S. seller’s choice of UCC Article 2 to govern formation. However, there is something intuitively troubling about allowing the U.S. seller to invoke its own choice of law to enforce against the buyer who initially made an offer without any such choice. The buyer cannot simply argue an absence of consent, because UCC 2–207 actually purports to find consent to non-material terms absent a timely objection.<sup>51</sup> Thus, the offeror’s intent, as determined by UCC 2–207, was to allow for conclusion of a contract under these circumstances. And yet, this standard of consent—one contrary to CISG Article 19—has seemingly been unilaterally imposed by the offeree, giving rise to the very concerns expressed during the drafting of CISG Article 6.<sup>52</sup> Perhaps one could define the offeror’s intent, as “master of the offer” solely by reference to the offer itself, which of course would not allow for an acceptance containing a provision “opting out” of the CISG. The principle of separability may also shed some light on the issue presented here.

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<sup>47</sup> This issue is similar to the question of whether an “opt out” provision can survive a determination that the contract in which it was contained was never concluded. However, the basis of the exclusion of material terms under UCC 2–207(2)(b) focuses specifically on a lack of consent. Consent to non-material terms is presumed, but material additional terms require actual consent. *See* UCC 2–207(2) and comments 2 and 3.

<sup>48</sup> *See* UCC 2–207 comments 4 and 5.

<sup>49</sup> Based on anecdotal evidence, this may in fact be true.

<sup>50</sup> This common practice need not rise to the level of a trade usage, but need only be sufficiently common that it would not be unreasonably surprising.

<sup>51</sup> *See* UCC 2–207 comment 6 (explaining that, with non-material terms, “[i]f no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to”).

<sup>52</sup> *See* Convention Incorporation Deliberations Summary, *supra* note 12, para. 9, 32.

The principle of separability would protect the validity of an “opt out” provision only from general formation defects of the main contract—not from defects relating specifically to the “opt out” provision itself.<sup>53</sup> The inclusion of the “opt out” provision is, in fact, the specific issue giving rise to the question of formation. In this instance, the “opt out” provision results in the formation of the main contract. However, if it did not, then the principle of separability would not preserve the “opt out” provision,<sup>54</sup> and the basis for the finding of non-formation would disappear. Again, there is something intuitively troubling about a the introduction of a provision that can change the outcome of a formation question in favor of formation, but cannot operate in the opposite direction lest the provision be lost in the process.

Perhaps the simplest answer is found by returning to the intent of the offeror, as determined pursuant to the offer itself, and ignoring the offeree’s unilateral efforts to redefine that intent. As with many issues, however, the “battle of forms” scenario presents a particular challenging context in which to evaluate any attempt to “opt out” of the CISG on issues of formation.

## 5. CONCLUSION

As suggested at the outset of Part 4, this article does not purport to exhaust the possible circumstances in which the challenge of opting out of the CISG on issues of formation may arise. Nor does this article purport to identify a single “bright line” rule with respect to resolving this challenge. However, the general principles identified in Part 3, along with the variety of considerations listed in Part 4 may be useful in addressing the issue based on any given circumstance in which it arises, in much the same fashion as the analysis of the foregoing hypotheticals presented in Part 4. In particular, the principle of the separable autonomy of any “opt out” provision would seem to be essential in a proper analysis of this issue,<sup>55</sup> inasmuch as it may play an important role in analyzing both the

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<sup>53</sup> See G. B. Born, 713–714 (explaining that an arbitration agreement may be rendered substantively invalid on normal contract grounds to the extent the invalidity defense relates specifically to the arbitration agreement). In a similar vein, an “opt out” provision should not be saved by the principle of separability from a failure to form the main contract when the failure was specifically caused by the addition of the “opt out” provision.

<sup>54</sup> For example, if an offeree attempted to “opt in” to the CISG in purporting to accept an offer otherwise governed by UCC Article 2 as a matter of private international law, the offeree’s additional term choosing CISG Article 19 would, if given effect, lead to a failure to conclude the contract containing the “opt in” provision, and the failure would relate specifically to the “opt in” provision itself.

<sup>55</sup> This principle was employed in the examination and analysis of four of the five hypothetical fact scenarios provided herein.



question of mutual intent to “opt out,” as well as the survival of such an “opt out” provision in the event of a failure to conclude the main contract. However, in some applications, such as the “battle of forms” scenario, opting out of CISG Article 6 on issues involving formation will continue to present an interesting challenge.