

The Economic Impact of International Trade on San Diego and the Application of the United Nations Convention on the International Sales of Goods to San Diego/Tijuana Commercial Transactions

ERNESTO GRIJALVA* AND ALEXANDER P. IMBERG**

I. NAFTA, FREE TRADE AND SAN DIEGO

Opponents of the North American Free Trade Agreement (“NAFTA”), were they to take a look, would find the current performance of San Diego’s economy antithetical to their economic theories. San Diego is conspicuously lacking the net job loss that free trade opponents were forecasting as the inevitable result of NAFTA. In his book, *Save Your Job, Save Our Country: Why NAFTA Must Be Stopped – Now!*, Ross Perot, the most prolific NAFTA basher, proclaimed that the economic strength of our entire nation would be jeopardized by NAFTA.¹ Four and one-half years later, we find that the United States is enjoying a full

* Vice President Latin America Legal Affairs, PriceSmat, Inc.; J.D., University of San Diego School of Law, 1984.

** Attorney at Law with the international firm of Carrol, Burdick & McDonough LLP, San Francisco, California; admitted to practice in Germany and California; Ref. iur. and Ass. iur. University of Mainz, 1993 and 1995; L.L.M., University of San Diego School of Law, 1997; Dr. iur., University of Mainz, 1997.

1. ROSS PEROT & PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED – NOW!* (1993).

employment economy, and that San Diego is actually experiencing labor shortages from unemployment rates consistently below four percent.² Nonetheless, while it appears that the dire predictions of NAFTA's impact were erroneous, it is evident from the ill-fated "Fast Track" debate in 1997 that free trade opponents are continuing to find a friendly audience for their claims of NAFTA failure.

What exactly has NAFTA's economic impact been both in San Diego and throughout the United States? In its 1996 comprehensive review entitled *North American Integration Three Years After NAFTA: A Framework for Tracking, Modeling and Internet Accessing the National and Regional Labor Market Impacts*, UCLA's North American Integration and Development Center ("NAIDC") demonstrated how difficult it was to empirically categorize NAFTA's success or failure, owing to the fact that NAFTA was but one of a myriad of variables that affected the United States/Canada/Mexico trade equation.³ Yet an analysis of available evidence did suggest that the trade agreement had resulted in a small net positive economic impact on United States with varying impacts in different parts of the country.⁴ Today, the available evidence regarding NAFTA's economic impact on San Diego is even more telling than it was when the NAIDC report was compiled.

According to the United States Department of Commerce ("D.O.C.") statistics for 1996, the most recent D.O.C. figures available as of the date of this Article, San Diego experienced the third largest gain in exports of all metropolitan areas in the United States, and Mexico was the destination for approximately forty-five percent of those exports.⁵ San Diego exports to Mexico increased by over fifty percent from 1.847 billion dollars in 1993 to 2.973 billion dollars in 1996.⁶ This increase is even more impressive in view of the fact that it occurred despite the economically devastating December 1994 devaluation of the Mexican peso, which dramatically reduced Mexico's ability to purchase foreign

2. In November 1997, the unemployment rates for the San Diego area dropped below four percent for the first time since the implementation of NAFTA. As of May 1998, unemployment has reached a low of 3.3 percent. San Diego labor and employment statistics can be obtained by contacting the California Employment Development Department, Economic Research Bureau of the Greater San Diego Chamber of Commerce.

3. RAUL OJEDA ET AL., *N. AM. INTEGRATION AND DEV. CTR., NORTH AMERICAN INTEGRATION THREE YEARS AFTER NAFTA: A FRAMEWORK FOR TRACKING, MODELING AND INTERNET ACCESSING THE NATIONAL AND REGIONAL LABOR MARKET IMPACTS* 16-32 (1996).

4. *See id.* at 7-15.

5. *See UNITED STATES DEPARTMENT OF COMMERCE, United States Census Bureau in Greater San Diego Chamber of Commerce*, 45 *ECON. BULL.* No. 11, June 1998, at 1, 1.

6. *See id.* at 5.

imports in 1995.

Although final trade figures for 1997 were not available at the time of publication, given that the California Trade and Commerce Agency has reported that California's total exports to Mexico increased by thirty-three percent in 1997, early indications are that 1997 may have seen one of the most significant increases in San Diego exports to Mexico in many decades.⁷ A commensurate rise for San Diego would mean that the region exported approximately \$3.85 billion in goods to Mexico in 1997. San Diego exports during early 1998 appear to be continuing to increase at a healthy pace, and there is little reason to doubt that sales for 1998 will exceed \$4.5 billion.⁸ A recurring annual increase in San Diego and California exports to Mexico is likely for several more years, particularly in light of the resurgence of the Mexican economy and the fundamental structural changes which Mexico has already implemented to its overly centralized governmental and financial systems. Such a continuing growth in exports will have significant implications to the labor market in San Diego.

A. *The San Diego Labor Market Experience*

At the time of the NAFTA debate in 1993, San Diego was in about the fourth year of a pronounced recession, its economy having been heavily impacted by defense industry downsizing. By the summer of 1993, San Diego's unemployment rate had reached a disturbing 8.4 percent.⁹ San Diegans' were forced to reconcile themselves to the fact that the old economic order had disappeared, taking tens of thousands of San Diego's jobs with it. Looking for a new direction, San Diego's community leaders began to recognize and speak openly about the fact that San Diego's international trade potential had been virtually ignored,

7. CALIFORNIA TRADE AND COMMERCE AGENCY, *California exports \$52.4 billion through first half of 1998; Despite world financial woes, Golden State is still nation's top exporter*, PRESS RELEASE, Sept. 4, 1998, at 1.

8. In 1996, San Diego exports amounted to \$2.973 billion. The state-wide increase for 1997 was thirty-three percent. During the last several years, San Diego's increase reflected the state increase, making 1997 San Diego exports to Mexico a likely \$3.8 billion. Preliminary numbers for 1998 have reflected an additional increase of twenty percent to twenty-five percent. *See id.*; *see also* UNITED STATES DEPARTMENT OF COMMERCE, *United States Census Bureau in Greater San Diego Chamber of Commerce*, 45 ECON. BULL. No. 11, June 1998, at 1, 1.

9. San Diego labor and employment statistics can be obtained by contacting the California Employment Development Department, Economic Research Bureau of the Greater San Diego Chamber of Commerce.

particularly given San Diego's geographic location on the United States/Mexico border and as the closest point in the continental United States to Southeast Asia. San Diego went from viewing itself as America's cul-de-sac to the intersection of America's future.

NAFTA appeared on radar shortly after San Diego's elected officials started embracing and sharing these revelations with their constituents. The more closely NAFTA was looked at, the more it seemed worthy of the support of San Diegans. Although NAFTA was initially opposed, by December 1993 most public opinion polls began to show that it was supported by a majority.¹⁰ Today, far more San Diegans seem to recognize the value of the trade agreement. In a poll conducted by the Greater San Diego Chamber of Commerce in the fall of 1997, sixty-seven percent of the local businesses responding stated that they believed NAFTA has directly or indirectly been responsible for creating a need to hire more employees, and only nine percent of the businesses responding believed that NAFTA has hurt our economy.¹¹

Although NAFTA cannot be credited with being responsible for all of San Diego's overall rise in employment, there is little to suggest that it hurt employment. In perhaps San Diego's best year ever, over forty-two thousand new jobs were created in 1997.¹² In May 1998, San Diego's regional unemployment rate dropped to 3.3 percent.¹³ In four years San Diego has gone from high unemployment to experiencing a labor shortage problem.

B. *The Long Term Opportunity*

On February 14, 1998, the *San Diego Union-Tribune* published an article entitled, "Companies Mull Foreign Move as Trade Bill Rusts."¹⁴ The article reported how QUALCOMM, perhaps San Diego's most important private employer, and companies throughout the United States were anticipating a need to invest in building foreign plants rather than

10. See Alan Tonelson, *A Lack of Support for Free-Trade Policies*, SAN DIEGO UNION-TRIB., May 28, 1998, at B5.

11. See Darrel Beutel, *Report Card from NAFTA Survey is an A+*, BUSINESS ACTION, Greater San Diego Chamber of Commerce, July 1997, at 2.

12. San Diego labor and employment statistics can be obtained by contacting the California Employment Development Department, Economic Research Bureau of the Greater San Diego Chamber of Commerce.

13. San Diego labor and employment statistics can be obtained by contacting the California Employment Development Department, Economic Research Bureau of the Greater San Diego Chamber of Commerce. United States Department of Labor uses four percent unemployment to demarcate full employment, in recognition that a certain percentage of the population seeking unemployment benefits is in job transition.

14. Finlay Lewis, *Companies Mull Foreign Move as Trade Bill Rusts*, SAN DIEGO UNION-TRIB., Feb. 14, 1998, at A1.

expanding domestically.¹⁵ The reason is not because free trade agreements have created enticements to move abroad; instead, the lack of United States progress toward more free trade agreements is making foreign investments the only alternative.¹⁶ As other countries negotiate and enter free trade agreements, the only way United States companies will be able to avoid the tariffs and other non-tariff trade barriers which their foreign competitors will not be facing is by manufacturing in the countries whose markets are being targeted.¹⁷

In addition to showing how some of the arguments against free trade are so far off the mark, the *Union-Tribune* article was also a warning shot across San Diego's economic bow. The concern now is whether San Diegans are paying attention or whether they are all too mesmerized by the size and speed of their fast moving, full employment economy to recognize the dangers of taking their hands off the steering wheel. The *Union-Tribune* article, along with the many articles that have repeated this message throughout the country, should serve as a wake-up call that a redirection of our national trade policy is required. Otherwise, we should not be surprised if San Diego's economy hits a shoal in another two to four years. That is about the length of time it might take for the European Union to complete its free trade agreement negotiations with the members of MERCOSUR and for European companies to start delivering their products. If this happens, the erosion of United States market share throughout Latin America will be pronounced.

To get new free trade agreements for the United States, the President needs Fast Track authority. With Fast Track authority, the President negotiates a trade agreement and presents it to Congress for a simple up or down vote. Amendments are not permitted. Foreign governmental officials, mindful of the significant tools available to any member of the U.S. Congress who is intent on using a trade agreement as a platform for political grandstanding, refuse to negotiate free trade agreements with any President who does not have Fast Track authority. Every President since Gerald Ford has been entrusted with Fast Track authority until Congress, under significant pressure from the odd coalition of left-wing labor unions, environmental interests, and right-wing protectionist xenophobes, allowed it to expire in 1994, shortly after approving NAFTA. Facing a probable loss in late 1997, President Clinton pulled a

15. *See id.*

16. *See id.*

17. *See id.*

Fast Track bill from Congressional vote at the last minute.

C. Conclusion

While the United States has stood still since the signing of NAFTA in December 1993, the rest of the world has since entered over twenty new free trade agreements. Most significantly, Canada and Mexico, our two NAFTA partners, now have numerous free trade agreements with countries throughout Central and South America. In addition, the European Union is actively negotiating free trade agreements with MERCOSUR, whose member countries comprise the largest block of consumers in South America.

It is possible that the lack of new United States free trade agreements will not severely impact San Diego's economy. In the fast moving information age, other factors which have not yet even been contemplated could come into play to create a new growth surge in United States market for San Diego products. Successes in the biotechnology industry could more than offset any setbacks in the export of telecommunication and other electronic equipment, which are the products most responsible for the overall surge in San Diego exports. These possibilities are often used by commentators to argue that new trade agreements are not necessary. But the commentators making this argument are often the same critics who argued in 1993 that NAFTA would devastate our economy by expanding the United States trade deficit and sacrificing United States jobs. The expanding trade deficit became a protectionist mantra. Today, while the United States trade deficit is the highest in history, United States employment levels are also the highest in history. Correspondingly, San Diego's economy is booming, resulting in a surplus of high paying jobs.

Whose judgment will San Diegans choose to trust? More importantly, are San Diegans willing to do anything to ensure their economy keeps running on all cylinders? Will they push for Fast Track authority or wait until the need is obvious and immediate? The answers to these questions may determine how long this economic boom lasts for San Diego as well as for our Country.

II. THE CISG AND PARTY AUTONOMY: IMPLIED EXCLUSION OF THE CISG AND CHOICE OF THE APPLICABLE SUBSTANTIVE LAW

Assume a Tijuana machine shop owner gets a call from a maquiladora factory in immediate need of a specialized air compressor for one of its production lines. The machine shop owner does not have that particular type of compressor, but knows who might have it in San Diego. He

jumps in his truck and drives to San Diego to a machine shop with which he has been doing business for years. He describes the urgency of the situation and gives the salesman the specifications of the needed compressor. The San Diego shop has a compressor that can be adapted to the maquiladora's specialized needs and proceeds to make those adaptations. When the compressor is complete, the Tijuana machine shop owner writes a check, and within an hour he is back in Mexico installing the compressor at the maquiladora.

The next day the compressor develops an electrical short and is destroyed. The Tijuana machine shop owner blames the San Diego machine shop for negligently installing the adaptations and places a stop payment order on his check. The San Diego machine shop blames the Tijuana machine shop owner for negligently installing the compressor and refuses to deliver a separate prepaid order for the Tijuana machine shop owner. Both machine shops want to sue the other to recover their respective damages. What substantive law should apply to such a dispute?

The temptation to use the appropriate venue as part of the answer to the question should be resisted. In the above scenario, the applicable law would probably not be either the laws of California, Baja California, the United States, or Mexico. Instead, the applicable law would likely be the United Nations Convention on the International Sale of Goods ("CISG").

III. AN OVERVIEW OF THE APPLICABILITY OF THE CISG

The CISG became effective in the United States on January 1, 1988, and in Mexico on January 1, 1989. The CISG generally applies to international sales contracts defined in Article 1 as "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."¹⁸ Therefore, the CISG is the body of law that is generally applicable to contracts for the sale of goods between a San Diego business and a Tijuana business where the parties have not expressly made a choice of law selection.¹⁹ The CISG applies

18. United Nations Convention on Contracts for the International Sale of Goods, art. 1(1)(a)-(b) 1980 [hereinafter CISG].

19. It should be pointed out that CISG, art. 1(1)(a) does not require an express

automatically unless there has been a conscious decision to exclude it. How parties go about excluding the application of the CISG has still not been universally and definitively established, but some important guidelines do exist.

A. *Explicit Exclusion*

As a general rule, the CISG yields to party autonomy. By virtue of Article 6, the contracting "parties may exclude the application of [the CISG] or . . . derogate from or vary the effect of any of its provisions."²⁰ An exclusion of the CISG in its entirety can be achieved either by explicit or implicit exclusion. Explicit exclusion calls for contractual language expressly excluding the application of the provisions of the CISG.²¹ The parties may even agree to "opt out" of the CISG without determining which body of law will take its place. Contractual language such as "The United Nations Convention on the International Sale of Goods does not apply to the present contract" probably suffices. In such a case, the applicable law will be determined by the conflict of laws rules within the jurisdiction in which the matter is brought.²²

B. *Implicit Exclusion*

The case of implicit exclusion, even though the more frequently encountered option, tends to present courts with a greater number of problems. First, it should be noted that the CISG does not recognize expressly the possibility of implicit exclusion. Whereas the CISG's antecedent, the Uniform Law on the International Sale of Goods ("ULIS"), The Hague, 1964, expressly mentioned the possibility of implicit exclusion, the CISG remains silent in this regard.²³ By eliminating this provision for the CISG, the drafters intended to limit the courts' power to generously exclude the CISG from application.²⁴ In a

agreement between the parties as to the applicability of the state. See CISG, art. 1(1)(a).

20. CISG, art. 6

21. See *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 n.1 (2d Cir. 1995).

22. See ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF* 32 (1991); JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION*, 106 n.2 (2d ed. 1991).

23. Article 3 of the ULIS stated "The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially, such exclusion may be express or implied." Uniform Law on the International Sale of Goods, art. 3, The Hague (1964).

24. See Commentary on the Convention on Contracts for the International Sale of Goods, United Nations Conference on Contracts for the International Sale of Goods,

number of cases decided under the ULIS, courts had excluded the international sales law on the basis of the contracting parties' *hypothetical* intent, balancing the parties' interests without actually requiring the manifestation of such intent in the language of the contract. In contrast, Article 6 of the CISG requires an *actual* manifestation of the parties' intent to exclude the CISG, and mere boilerplate provisions will no longer suffice to push the international sales law aside.²⁵ There must be an ostensibly verifiable indication of intent, as opposed to an assumed or hypothetical agreement of exclusion between the parties.²⁶

How do parties know which contractual provisions represent a mere boilerplate provision and which would be recognized by the courts as sufficient manifestation of party intent? Suppose, for example, a San Diego buyer and Tijuana seller agreed to the following provision: "The present contract shall be governed by the laws of the State of California." It is not entirely clear how United States courts would decide such a case, as there are no reported United States decisions with regard to this issue. A 1994 decision by the Ad hoc Arbitral Tribunal in Florence, Italy, held that the indication of the law of a Contracting State would amount to an implicit exclusion of the CISG.²⁷ However, the general international trend among courts and legal scholars is to regard the mere indication of the law of a Contracting State, if it is made without particular reference to the domestic law of that State, as insufficient.²⁸

Contracting States are countries that have signed the CISG and ratified it as valid national law. If both parties to an international dispute are

Vienna, March 10 - April 11, 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, New York 1981, p. 17, Art. 5, § 2; PETER SCHLECHTRIEM, INTERNATIONALES UNKAUFRECHT, EIN STUDIEN- UND ERLÄUTERUNGSBUCH ZUM ÜBEREINKOMMEN DER VEREINigten NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF, 12-15 (1996); HERBER & CZERWENKA, *supra* note 25, at 33.

25. See CISG, art. 6

26. See HERBER & CZERWENKA, *supra* note 27, at 33.

27. See Societa' X v. Societa' Y, Ad hoc Arbitral Tribunal, Florence, Italy, April 19, 1994, published in, DIRITTO DEL COMMERCIO INTERNAZIONALE 861 (1994). A summary of this case can be located at the Pace University web-page, <<http://www.cisg.law.pace.edu>>.

28. See, e.g., ERNST VON CAEMMERER & PETER SCHLECHTRIEM, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 53, art. 6 n. 16 (1995) [hereinafter SCHLECHTRIEM/HERBER]; MARTIN KAROLLUS, JUDICIAL INTERPRETATION AND APPLICATION OF THE CISG IN GERMANY 1988-1994, Cornell Review of the Convention on Contracts for the International Sale of Goods (1995), p. 51 - 94; SCHLECHTRIEM, *supra* note 27, at n. 20.

from Contracting States, as is the case in the aforementioned example of a contract between a United States seller and a Mexican buyer,²⁹ the CISG is the governing substantive law.³⁰ If the CISG is not already the governing law because the parties originate from two Contracting States, the CISG will apply when the rules of the international private law of the *lex fori* point in the direction of the law of a Contracting State.³¹ In this scenario, neither party has to come from a Contracting State.³² Since most international rules concerning conflicts of law are based on the principle of party autonomy,³³ the CISG will be generally applicable in such cases in which a buyer and seller simply agree to apply the law of a Contracting State.³⁴

It should be noted that under Article 95 of the CISG a Contracting State may exclude Article 1(1)(b) from application to the Contracting State if it declares so "at the time of the deposit of its instrument of ratification, acceptance, approval or accession."³⁵ The United States is one of the few Contracting States that actually made use of this provision. Therefore, Article 2 of the U.C.C. will most likely apply in cases where neither or only one party comes from a Contracting State and the rules of international private law designate United States law as the substantive law governing the dispute.³⁶

IV. LACK OF UNITED STATES CASE LAW—CASE LAW AND THE ROLE OF FOREIGN CASE LAW

As has been mentioned above, there are no United States decisions (federal or state) on point that provide parties with more specific

29. The CISG is applicable law in the United States since January 1, 1988 and in Mexico since January 1, 1989.

30. See CISG, art. 1(1)(a); see also *Claudia v. Olivieri Footwear*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998); *Helen Kaminski Pty. Ltd. v. Marketing Australian Prods., Inc.*, Nos. M-47(DLC), 96B46519, 97-8072A, 1997 WL 414137, at *2 (S.D.N.Y. July 23, 1997); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 n.1 (2d Cir. 1995).

31. See CISG, art. 1(1)(b); see also MARTIN KAROLLUS, UN-KAUFRECHT: EINE SYSTEMATISCHE DARSTELLUNG FÜR STUDIUM UND PRAXIS 30 (1991).

32. See SCHLECHTRIEM/HERBER, *supra* note 31, at 53, art. 1 n. 35.

33. See *id.* at 53, art. 1 n. 38.

34. This occurred in an ICC Arbitration Case where parties from the USA and the Netherlands chose Swiss law. See ICC Arbitration Case No. 7565 (1994); see also ICC Arbitration Case No. 6653 (1993) (holding CISG applicable where parties from Germany and Syria chose French law); OLG Düsseldorf, 02.07.93, 17 U 73/93 (holding CISG applicable where parties from Germany and the Russian Federation chose Italian law).

35. CISG, art. 95.

36. Compare HONNOLD, *supra* note 25, at art. 1 n. 47.

guidance on what contractual language would suffice to show an implied intent by the parties to exclude the CISG. In *Helen Kaminski Pty. Ltd. v. Marketing Australian Products*,³⁷ a United States District Court for the Southern District of New York decision, the court made reference to the possibility of explicitly excluding the CISG, but appeared to leave no room for the possibility of an implied exclusion by stating that the "CISG is an international agreement that applies to sales of goods between parties in signatory nations, unless the parties expressly contract to be bound by another source of law."³⁸ However, in *Delchi Carrier v. Rotorex Corp.*,³⁹ a previous United States Court of Appeals decision cited to in *Helen Kaminski*, the court stated in general terms that the "parties may by contract choose to be bound by a source of law other than the CISG."⁴⁰ Therefore, the language in *Delchi Carrier* does not preclude the possibility of an implied exclusion of the CISG.⁴¹

The court in *Delchi Carrier* also stated that "there is virtually no caselaw under the [CISG]."⁴² This broad statement by the court exposes the parochial view that pertinent "caselaw" is *United States* caselaw. In fact, court and arbitral rulings on the CISG will soon number over 500, most of them rendered by non-United States tribunals.⁴³ These decisions should be treated by United States courts as persuasive authority because Article 7(1) of the CISG calls for the promotion of uniformity in the interpretation and the application of the CISG.⁴⁴ Uniform worldwide application can only be realized if courts from different national jurisdictions look beyond the boundaries of their own country and start paying attention to how courts from other Contracting States interpret

37. Nos. M-47(DLC), 96B46519, 97-8072A, 1997 WL 414137 (S.D.N.Y. July 23, 1997).

38. *Id.* at *1 (emphasis added).

39. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024 (2nd Cir. 1995).

40. *Id.* at 1027-28 n.1.

41. *See id.* The court's discussion of silence as to choice of law does not preclude the option of implied exclusion when certain contractual language is used that implies intent of the parties to exclude the CISG.

42. *Delchi Carrier*, 71 F.3d at 1028.

43. The Pace University CISG database is an excellent resource to learn about the most recent decisions worldwide. Its web-page can be found at <<http://www.cisg.law.pace.edu>>.

44. *See* CISG, art. 7(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."); *see also Delchi Carrier*, 71 F.3d at 1028-29 (acknowledging the Article 7 requirement for international uniformity, but failing to apply international case law in rendering its decision).

the CISG. Only when courts begin to distinguish their opinions from the applicable rulings of foreign jurisdictions, will the CISG become a truly unified international law for the sale of goods. Divergent decisions with respect to the same or similar issues will prevent the goal of the unification of the CISG.⁴⁵

V. THE TWO POSITIONS WITH RESPECT TO IMPLIED EXCLUSION

The question still remains, however, as to which contractual language represents a mere boilerplate provision and which would be recognized by the courts as sufficient manifestation of party intent. Suppose, for example, that our United States seller and Mexican buyer agree to the following provision: "The present contract shall be governed by the laws of the State of California." Would this language suffice to impliedly exclude the CISG?

A. *Minority View*

In a case with a similar contractual provision, the Ad hoc Arbitral Tribunal in Florence, Italy, held that the indication of the law of a Contracting State would amount to an implicit exclusion of the CISG.⁴⁶ An agreement between an Italian seller and a Japanese buyer contained a clause under which the contract was to be "governed exclusively by Italian law."⁴⁷ In a majority decision, the Ad hoc Arbitral Tribunal decided that the CISG would not apply because Japan had not yet ratified the CISG and the contract itself had been made subject exclusively to Italian law.⁴⁸

In a dissenting opinion, one of the arbitrators stated that the CISG did apply.⁴⁹ The reasoning was that Article 1(1)(b) made the application of the CISG possible to contracts where only one of the parties belonged to a Contracting State and that, with their choice to apply Italian law, the parties only confirmed that they intended to have the CISG apply

45. See SCHLECHTRIEM/HERBER, *supra* note 31, at art. 7 n. 14; KAROLLUS, *supra* note 34, at 11; BIRGIT REIMERS-ZOCHER, BEWEISLASTFRAGEN IM HAAGER UND WIENER KAUFRECHT, BEITRAGE ZUM EINHEITSRECHT UND ZUR RECHTSVERGLEICHUNG 114 (1995); HONNOLD, *supra* note 25, at n. 92 (stressing the danger of forum shopping as a result of internationally divergent decisions interpreting the CISG).

46. See *Societa' X v. Societa' Y*, Ad hoc Arbitral Tribunal, Florence, Italy, April 19, 1994, published in, DIRITTO DEL COMMERCIO INTERNAZIONALE 861 (1994). A summary of this case can be located at the Pace University web-page, <<http://www.cisg.law.pace.edu>>.

47. *Id.*

48. See *id.*; see also KAROLLUS, *supra* note 34, at 38-39.

49. See *Societa' X*, DIRITTO DEL COMMERCIO INTERNAZIONALE 861.

pursuant to Article 1(1)(b).⁵⁰

B. Predominant Trend

The general international trend among courts⁵¹ and legal scholars⁵² coincides with the dissenting arbitrator's opinion. The mere indication of the law of a Contracting State, if it is made without particular reference to the domestic law of that State, is considered insufficient to impliedly exclude the CISG. For example, the German Federal Supreme Court in *Benetton II* reasoned that an agreement to apply "German law" by itself would not suffice to exclude the CISG, since the CISG was actually part of the German law.⁵³ The ICC came to the same conclusion in a 1994 case where a Dutch seller and a United States buyer had chosen "the laws of Switzerland" as the governing substantive law.⁵⁴ At the time of the formation of the contract, the CISG was in effect in Switzerland as well as in the United States, but not in the Netherlands. In holding that the CISG was in fact the governing law, the ICC reasoned that the CISG was part of the laws of Switzerland and that the parties themselves had referred to "the laws of Switzerland" and not to "Swiss law."⁵⁵

VI. CONCLUSION

While the ICC's distinction between "the laws of Switzerland" and "Swiss law" appears narrow, a general trend concerning implicit exclusion of the CISG can be noted. The mere reference to the law of a Contracting State will not be enough to exclude the CISG from

50. *See id.*

51. *See, e.g.*, LG Heidelberg, October 2, 2996; OLG München, /U 3758/94, February 8, 1995; OLG Köln, February 22, 1994; OLG Koblenz, September 17, 1993; LG Stuttgart, August 13, 1991; Budapest Arbitration Proceeding Vb 96038, May 8, 1997; ICC Arbitration Case No. 7660 of 1994; Vienna Arbitration Proceeding SCH-4318, June 15, 1994. In another case where the parties had agreed to apply German law, the court properly held that the CISG, as the German foreign trade law, was to be applied. *See* OLG Karlsruhe, I U 280/96, June 25, 1997

52. *See, e.g.*, SCHLECHTRIEM/HERBER, *supra* note 31, at art. 6 n. 16; KAROLLUS, JUDICIAL INTERPRETATION, *supra* note 31, at 51-94; SCHLECHTRIEM, *supra* note 27, at n. 20.

53. *Benetton II*, BGH, VIII ZR 134/96 (July 23, 1997) (referencing SCHLECHTRIEM/HERBER, CISG, 2. Aufl., Art 6 Rdn. 16). The CISG has been valid law in Germany since January 1, 1991.

54. *See* ICC Arbitration Case No. 6653 (1993).

55. *Id.*

application to a dispute, assuming the deciding court heeds the requirement of Article 7(1) to seek uniformity in its application. The CISG is the substantive law of each Contracting State. Once the preconditions of its applicability have been satisfied, the CISG is generally the law that applies to contracts for the international sales of goods in each Contracting State. In order to effectively exclude the CISG from a contractual relationship, parties need to be more specific in their choice of law clause. They need to provide a choice of law term such as "California Sales Law" or "Article 2 of the Uniform Commercial Code." Another solution is to expressly exclude the CISG by stating, for example, "The CISG shall not apply to the present contract. Instead, it shall be governed by the provisions of Article 2 of the Uniform Commercial Code."

The predominant international trend clearly favors the application of the CISG in order to further the unification of the international sales law. It has to find its limits, however, where the parties' real intent, as expressed in the language of the individual contract, proves to favor national law.