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Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods

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Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, and Swiss Contract Law

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I. INTRODUCTION

A. *The Convention's Validity Provision*

The United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980[1] (CISG or Convention) addresses the formation of sales contracts and parties' rights and obligations that arise therefrom.[2] The Convention states that it does not address questions concerning the "validity" of these contracts.[3] Because the Convention does not define the term "validity," however, it is subject to interpretation what issues the Convention excludes from its scope through the term "validity."

Under article 4(a) of the CISG, domestic law governs if a sales contract's validity is at issue.[4] One must consult the conflict of laws provisions of private international law to determine which domestic law is applicable.[5]

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (1980) [hereinafter Convention or CISG], *reprinted in* Final Act of the United Nations Conference on Contracts for the International Sale of Goods, 19 I.L.M. 668, 671 (1980).

2. CISG arts. 1-5 (defining an international sale).

3. "In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

a) the validity of the contract or any of its provisions. . . ." CISG art. 4(a).

4. von Caemmerer, *Internationale Vereinheitlichung des Kaufrechts*, 77 SCHWEIZERISCHE JURISTEN-ZEITUNG 257, 262-263 (1981); J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, art. 4, para. 65 (1982) [hereinafter UNIFORM LAW]; P. SCHLECHTRIEHM, EINHEITLICHES UN-KAUFRECHT 18 (1981); P. SCHLECHTRIEHM, UNIFORM SALES LAW, THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 32 (1986) [hereinafter UNIFORM SALES LAW].

5. Honnold, *The New Uniform Law for International Sales and UCC: A Comparison*, 18 INT'L LAW. 21, 23-24 (1984). *Contra* Gonzalez, *Remedies Under the U.N. Con-*

In contrast to the Convention, the Swiss Code of Obligations as well as relevant Swiss literature and jurisprudence clearly address the issue of contractual validity.[6] Swiss contract law's error provisions are characterized as contract validity rules.[7] If, for instance, a buyer claims that he erred on a certain fact that was a necessary basis for him to enter into an international sales contract under which the parties stipulated that the Convention would provide the applicable law and Zurich would be the forum of litigation, a Zurich court would probably characterize the claim as an issue requiring application of domestic validity rules. In light of the Convention, would this characterization be correct? The interplay between Swiss contract law's approach to a contract's validity and that of the Convention gives rise to this Article's central focus.

B. *The Central Issues*

This Article will focus on three questions: (1) does the Convention address factual situations that fall under provisions of domestic law regarding the validity of a contract? (2) what law should apply if the Convention addresses a factual situation that also triggers domestic law provisions regarding the validity of a contract? and (3) should the Convention or domestic law determine the meaning of the term "validity" for CISG article 4(a) purposes?

C. *Approach*

This Article will first present the relevant Swiss error provisions. Second, it will focus on several factual situations that invoke the Swiss error provisions, and it will examine whether these situations also trigger the rules of the Convention. Finally, this Article will analyze the relationship between the rules of the Convention and domestic law in those situations that trigger both the Convention and Swiss contract law. This approach provides a clear sense of what the Convention excludes from its scope through its use of the term "validity" and determines to what extent courts can apply the Convention exclusively.

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vention for the International Sale of Goods, 2 INT'L TAX & BUS. LAW. 79, 82-83 (1984) (arguing that the law of the forum should apply to these issues).

6. *See infra* notes 8-10 and accompanying text.

7. *See infra* notes 11-12 and accompanying text.

II. Swiss Contract Law Error Provisions

A. *Error on a Basic Fact*

Swiss contract law, Obligationenrecht [OR] articles 23 and 24, establishes protection for a person acting under a *material* error at the conclusion of a contract.[8] Relevant literature and the Swiss Supreme Court label an error under OR article 24(1) subparagraph 4 as an error on a basic fact.[9] This Article will consider only errors on a basic fact and will not consider the other kinds of errors that OR article 24(1) subparagraphs 1 through 3 regulate.[10]

B. *The Error Provision as a Rule of Validity*

Swiss contract law does not expressly provide that its error provisions relate to the validity of a contract. Instead it characterizes a material error as a "defect" in the conclusion of a contract.[11] Both the relevant literature and the Swiss Supreme Court have, however, consistently interpreted OR article 24(1) subparagraph 4 as a rule of validity.[12]

OR article 31 provides that if a party enters into a contract under a mistaken belief, it may declare to the other party that it is not bound by the contract.[13] An erring party must make this declaration within one

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8. Schweizerisches Obligationenrecht [hereinafter OR] (1911), *reprinted in* Swiss Contract Law (Swiss-American Chamber of Commerce trans. 1977).

9. "An error is, in particular, deemed to be material in the following cases:

. . .

4. if the error related to certain facts which the party in error, in accordance with the rules of good faith in the course of business, considered to be a necessary basis of the contract." OR art. 24(1) subpara. 4; Judgment of April 11, 1927, 53 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [hereinafter BGE] II 153; E. Bucher, Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht 175 (1981); T. Guhl, H. Merz & M. Kummer, Das Schweizerische Obligationenrecht 121 (1980).

10. OR art. 24(1) subparas. 1-3 (describing some mistakes concerning statements that are material errors).

11. "A person acting under material error at the conclusion of a contract is not bound by it." OR art. 23.

12. Judgment of April 11, 1927, BGE 53 II 153; E. Bucher, *supra* note 9, at 176; P. Gauch, W. Schluep & P. Jaeggi, Schweizerisches Obligationenrecht, Allgemeiner Teil § 587 (1983); T. Guhl, H. Merz & M. Kummer, *supra* note 9, at 123-24; M. Keller & C. Schoebi, Das Schweizerische Schuldrecht, Band I, Allgemeine Lehren des Vertragsrechts 113, 116 (1982) (arguing that since the erring party has the option to cancel the contract, the material error affects the contract's validity).

13. OR art. 31.

year from the time it discovers the error[14] or within ten years from the time the parties concluded the contract, whichever period expires first.[15]

C. *The Materiality Standard*

In order for an error on a basic fact to be material, the Swiss Supreme Court requires the error to fulfill the following requirements: (1) The erring party must have considered the erroneous fact a necessary basis for concluding the contract[16] (the subjective element of the test); (2) the erroneous fact must have been a necessary basis for concluding the contract under rules of good faith in the course of business[17] (the objective element of the test); and (3) the partner of the erring party must have recognized or been able to recognize that the fact was a necessary basis for the erring party to enter into the contract[18] (the recognizability element of the test).

The facts from the following Swiss case demonstrate the materiality standard's application: The plaintiff instituted suit in the Swiss Supreme Court alleging that the Van Gogh painting known as "Self-portrait of Van Gogh," which he had purchased from the defendant, was a copy.[19] At trial the plaintiff presented evidence that the painting was a copy and that he had believed he was buying an original piece of art.[20] The plaintiff established, therefore, that he had made a material error in entering into the contract. The court reasoned that the plaintiff would not have bought the painting had he known it was a copy (the subjective element of the test), that the defendant, acting in good faith in the course of business, would not have agreed to the terms of the contract had he been aware that the painting was not an original (the objective element of the

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14. "If the party influenced by error . . . fails, within one year, to declare to the other party that he is not bound by the contract, or fails to demand restitution, then the contract is deemed to be ratified.

Such period runs, in the event of error. . . , from the time of its discovery. . . ." OR art. 31.

15. "After ten years, all claims for which the federal civil law does not provide another time period are forfeited because of the statute of limitations." OR art. 127; *see e.g.*, P. ENGEL, TRAITE DES OBLIGATIONS EN DROIT SUISSE 223 (1973).

16. Judgment of June 17, 1969, BGE 95 II 409; P. GAUCH, W. SCHLUEP & P. JAEGGI, *supra* note 12, at § 592; M. KELLER & C. SCHOEBI, *supra* note 12, at 131 (calling such a necessary basis a *condicio sine qua non* of the contract).

17. Judgment of March 10, 1971, BGE 97 II 43, 47; P. GAUCH, W. SCHLUEP & P. JAEGGI, *supra* note 12, at § 595; M. KELLER & C. SCHOEBI, *supra* note 12, at 131.

18. Judgment of January 23, 1979, BGE 105 II 22; E. BUCHER, *supra* note 9, at 179; P. GAUCH, W. SCHLUEP & P. JAEGGI, *supra* note 12, at § 593.

19. Judgment of October 16, 1962, BGE 82 II 411.

20. *Id.*

test) and that the defendant must have recognized that the plaintiff believed he was purchasing the original "Self-portrait of Van Gogh" (the recognizability element of the test). Thus, the facts met the requirements of the material error test, and the court upheld the plaintiff's claim.[21]

An error that meets the requirements of the three-pronged test is material under OR article 24(1) subparagraph 4 and constitutes, therefore, an error on a basic fact. A party concluding a contract under a material error may cancel the contract by declaring to the other party that it is not bound by the contract.[22]

III. CASES UNDER OR ARTICLE 24(1) SUBPARAGRAPH 4

One can distinguish the cases presented to the Swiss Supreme Court under OR article 24(1) subparagraph 4 by differentiating the various kinds of errors they involve. This section will categorize cases involving the most important and significant types of errors. The next section will focus on whether the Convention applies to each of these categories.

One can classify the cases into four groups according to the errors they involve.[23] The cases concern errors related to: (1) the quality of the goods to be delivered under the contract; (2) the purpose of the contract; (3) future events; or (4) the legal basis of the contract.

A. *Errors Concerning the Quality of Goods*

The factual situations in this section typically involve plaintiffs who made mistakes concerning a specific quality or qualities of certain goods. The case presented in the previous section involves a typical error related to the quality of goods.

In another case the plaintiff, a restaurant owner, had purchased a coffee machine for his restaurant.[24] The machine bore a label indicating that the competent federal department had examined it for safety, but in

21. *Id.* Where an error on the quality of the goods is in issue, the erring party may rely on the warranty provisions of Swiss contract law as an alternative to the error provisions remedy. In this case, however, the requirements of the warranty provisions were not met. The Court reasoned that although the painting was a copy, the seller had delivered the specified painting on which the parties had agreed. In addition, under Swiss law the statute of limitations for breach of contract claims based on the warranty provisions expires within one year after the goods have been handed over to the buyer. In the present case the plaintiff had failed to bring suit before the one year period expired.

22. OR art. 31.

23. C. HEIZ, GRUNDLAGENIRRTUM 45, 57, 71 (1985), discussing in detail how to distinguish the cases involving errors on a basic fact in light of the Swiss Supreme Court's materiality standard.

24. Judgment of April 29, 1980, BGE 106 II 32.

fact the machine had never been subject to an examination.[25] The plaintiff brought suit alleging that he had not known the machine was not safety-tested and that the lack of the safety test constituted an error on a basic fact.[26] The Swiss Supreme Court, reasoning that the alleged error met the requirements of the three-pronged test, granted the plaintiff's motion to invalidate the contract.[27]

B. *Errors Concerning a Contract's Purpose*

Certain errors on a basic fact occur when a party does not achieve the result for which it contracted. For example, in one case the plaintiff alleged that he had purchased a particular piece of land in order to build a one-family house.[28] He had discovered, however, that the land was not suitable for construction of a house unless he spent substantial sums of money to prepare the soil. The plaintiff sued the seller claiming that the suitability of the land for construction was a necessary basis of the contract. Since construction of a house was not possible, the plaintiff argued, he had been mistaken as to a basic fact when entering into the contract.[29] The court upheld the plaintiff's claim to revoke the contract, reasoning that the alleged error concerned the real purpose of the contract and met the requirements of the materiality test.[30]

In a similar case, the plaintiff had purchased a restaurant from the defendant, but the local authorities had rejected the plaintiff's subsequent application for a license to run the restaurant.[31] According to the relevant state law, the authorities could grant a restaurant license only if sufficient local demand existed. An inquiry revealed that demand for the plaintiff's restaurant was insufficient.[32] The plaintiff sought revocation of the contract on the grounds that the permit was a necessary basis for concluding the contract. He claimed that the rejection of his application constituted an error within the scope of the Supreme Court materiality standard.[33] The Swiss Supreme Court upheld the claim, pointing out that the permit to operate the restaurant was not only a necessary basis

25. *Id.*
26. *Id.*
27. *Id.*
28. Judgment of March 14, 1961, BGE 87 II 137.
29. *Id.* at 138.
30. *Id.* at 139.
31. Judgment of July 9, 1929, BGE 55 II 184.
32. The relevant test for a sufficient demand focused on the relation between the population and the existing restaurants within a defined area of the city and whether this comparison reached a certain quota.
33. *Id.*

for the buyer to make the contract but was, as a general matter, the real purpose for buying the restaurant.[34] If the buyer could not open a restaurant, the purpose of the contract would not be achieved. Such an error concerning the purpose of a contract is material according to the court's materiality test.[35] The court assumed in this case that the defendant must have been aware of the buyer's purpose in purchasing the restaurant.[36]

C. *Errors Concerning Future Events*

Courts have had difficulty deciding whether a party's incorrect expectations about future events or future omissions support relief under OR article 24(1) subparagraph 4. The Swiss Supreme Court, after rejecting these claims for many years, decided that errors involving future events can meet the materiality test requirements.[37] The court ruled that errors are only material, however, when they involve future events or omissions that were foreseeable to the parties.[38]

In this case the Swiss Supreme Court reasoned that the rejection of the plaintiff's application to operate a restaurant was a future event that arose after the conclusion of the contract.[39] The court held that a future event can be the subject of a material error if, as in this case, both parties acting in good faith believed the occurrence of the future event was a necessary basis for conclusion of the contract.[40]

In another case, the buyer sought revocation of a contract to buy a piece of land.[41] The Swiss Supreme Court noted that obtaining permission to construct a house constituted a future event.[42] The court reaffirmed its holding that a future event can be a prerequisite for conclusion of a contract and that an error concerning a future event can meet the materiality requirements if the future event was foreseeable to the parties.[43]

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34. *Id.*

35. *Id.*

36. *Id.* at 189. The court also considered whether this case involved an error about a future event. *Id.*

37. Judgment of July 9, 1929, BGE 55 II 184; *see also* Judgment of June 2, 1953, BGE 79 II 272, 275.

38. *Id.* at 188.

39. *Id.*

40. *Id.* at 188-89.

41. Judgment of June 17, 1969, BGE 95 II 407 (the court denied the plaintiff's claim on other grounds).

42. *Id.* at 410.

43. *Id.*

The Swiss Supreme Court has stated more recently that it considers a future event to be foreseeable if both parties to a contract were convinced at the time they entered into the contract that the event would materialize.[44] The court noted, however, that future events having a speculative character are unforeseeable and do not constitute a material error.[45]

D. *Errors Concerning a Contract's Legal Basis*

Plaintiffs have sought revocation of contracts on the ground that they erred regarding the legality of the contracts' prerequisites. The following case illustrates this type of error: The plaintiff challenged a contract to buy the stock of a company from the defendant, the majority shareholder.[46] The company had failed, however, to comply with legal requirements for the formation of a corporation.[47] The plaintiff sought revocation of the contract claiming his error about the validity of the corporation's formation was a necessary basis for entering into the contract.[48] The Swiss Supreme Court upheld the claim, stating that valid incorporation is a necessary basis for a subsequent sale of a corporation's stock.[49] The court ruled that the plaintiff's error concerning the validity of the corporation's formation met the materiality requirements of OR article 24(1) subparagraph 4.[50]

IV. CISG ARTICLE 4(a)

A. *Scope of the Article*

A party's claim that a contract was made under the influence of an error raises the question whether CISG article 4(a) refers that claim to domestic law.

Some commentators have noted that the Convention does not address the issue of error at all.[51] The claim for revoking a contract on the

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44. Judgment of June 7, 1983, BGE 109 II 105, 111.
45. *Id.* at 112.
46. Judgment of September 13, 1917, BGE 43 II 487.
47. *Id.* at 487-88.
48. *Id.*
49. *Id.* at 494.
50. *Id.* at 495.
51. Bydlinski, *Das allgemeine Vertragsrecht*, in DAS UNCITRAL-KAUFRECHT IM VERGLEICH ZUM OESTERREICHISCHEN RECHT 57, 85-86 (P. Doralt ed. 1985); von Caemmerer, *supra* note 4, at 262; Huber, *Der UNCITRAL-Entwurf eines Uebereinkommens ueber internationale Warenkaufvertraege*, 43 RABELS ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT, 413, 431 (1979); Volken, *Champ d'application, interpretation, lacunes, usages*, CONVENTION DE VIENNE DE 1980 SUR

ground of an error is, as a general matter, a question concerning contract validity that CISG article 4(a) expressly refers to domestic law.[52] One commentator, von Caemmerer, has stated that the scope of the Convention as a uniform sales law would be exceeded if the issues of error and avoidance of contract were subject to the Convention.[53]

Other commentators, Honnold and Schlechtriehm, have argued that the reference to domestic law is more limited.[54] Honnold has stressed that the Convention could not achieve its unifying character if domestic law governed an issue that the Convention addressed.[55] He argues that the Convention displaces domestic law provisions when a factual situation triggers a provision of domestic law as well as a rule of the Convention.[56] Consequently, according to Honnold it is insignificant whether domestic law labels a particular issue as a question of validity. The "crucial question is whether the domestic rule is invoked by the same operative facts that invoke a rule of the Convention."[57] Honnold argues that an error regarding the quality of goods is an issue that the Convention should govern exclusively: first, CISG article 35 addresses whether the quality of goods conforms to the contract, and second, the Convention affords the appropriate remedies to a buyer in the case of nonconforming goods.[58] If, on the other hand, the Convention does not deal with an issue regarding the validity of a contract, under Honnold's theory domestic law should govern.[59] For instance, national law and not the Convention should forbid the sale of a particular product or entitle a party to revoke a contract that the party concluded unaware of the willful deception of the other party.[60]

LA VENTE INTERNATIONALE DE MARCHANDISES 31 (Lausanne Colloquium, November 1984); *cf.* Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 280 (1984) (pointing out that the term "mistake" is not self-defining and that substantial disagreement exists over whether such a term is within the scope of the Convention).

52. Bydlinski, *supra* note 51, at 86.

53. von Caemmerer, *supra* note 4, at 262-263.

54. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 35, para. 240; Honnold, *On the Road to Unification of the Law of Sales*, FORUM INTERNATIONALE 5, 9 (June 1983); P. SCHLECHTRIEHM, EINHEITLICHES UN-KAUFRECHT, *supra* note 4, at 19; P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 33.

55. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 35, para. 240.

56. *Id.*

57. *Id.* art. 4, para. 65.

58. *Id.* art. 35, para. 240.

59. *Id.*

60. *Id.* art. 4, paras. 64-65; *see also* P. SCHLECHTRIEHM, EINHEITLICHES UN-KAUFRECHT, *supra* note 4, at 19.

Schlechtriehm has argued that in light of CISG article 4(a), domestic law regulates questions concerning the validity of a contract such as "the capacity to contract and the consequences of mistake, gross unfairness, unconscionability and fraud."[61] He stresses, however, that domestic law governs questions concerning the validity of a contract only to the extent that "the Convention does not include express provisions to the contrary."[62] He states that such a provision need not expressly deviate from the domestic provision.[63] He argues that if the Convention "specifically and conclusively" addresses a particular issue, then one cannot apply domestic law.[64] Schlechtriehm concludes that domestic law does not govern if the party erred about the quality of the goods.[65] Under this theory the issue of quality falls exclusively under the Convention's provisions on conformity of goods.[66]

Bydlinsky has strongly criticized Schlechtriehm's arguments, arguing that the Convention does not attempt to deal with every situation concerning the quality of goods.[67] Bydlinsky believes the Convention focuses on the obligation of a seller to deliver goods conforming to the contract.[68] Under Bydlinsky's theory the Convention determines whether a seller duly performs his obligations or whether he is liable for breach of contract if the delivered goods lack the required qualities.[69] Bydlinsky believes an error concerning the quality of goods at the time of a contract's conclusion is a question concerning the valid making of the contract and, therefore, of the contract's validity itself.[70] The Convention's provisions on the conformity of goods do not address the validity of the underlying contract; article 4(a) leaves this issue to domestic law.[71]

B. *Legislative History of the Article*

The legislative history of CISG article 4(a) indicates that the United Nations Commission on International Trade Law (UNCITRAL) addressed the question of whether the Convention should include provi-

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61. P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 32.
62. *Id.* at 33.
63. *Id.*
64. *Id.*
65. *Id.* at 66-67.
66. *Id.* at 67-69; P. SCHLECHTRIEHM, EINHEITLICHES UN-KAUFRECHT, *supra* note 4, at 19.
67. Bydlinski, *supra* note 51, at 85-86.
68. *Id.* at 86.
69. *Id.*
70. *Id.*
71. CISG art. 4.

sions on the validity of a contract.[72] In particular, the UNCITRAL Working Group on the International Sale of Goods (Working Group) considered several proposals related to the doctrine of mistake.[73] The Working Group decided, however, not to include any mistake provision in the draft Convention.[74]

One of the rejected proposals is of particular interest. It states:

> The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a *remedy based on the non-conformity of the goods* with the contract or on the existence of rights of third parties in the goods.[75]

One argument against this proposal that surfaced during the Working Group's discussions is that the Convention should not restrain domestic law provisions concerning mistake. The proposal could unjustifiably deprive a buyer of a domestic law remedy based on mistake if it compelled him to rely exclusively on the Convention's nonconforming goods provision.[76]

Another argument emphasized that the proposed provision would be unnecessary. If goods were nonconforming, the appropriate remedy would have to involve the rules of nonconforming goods; on the other hand, if a mistake in the specification of goods existed, a party would have to rely on the mistake provision.[77]

The evolution of CISG article 4(a) seems to indicate that the Working Group intentionally excluded all questions of mistake from the Convention and referred them to domestic law.[78] Such an inference is not conclusive, however, for two reasons: (1) the history of CISG article 4(a) does not determine what types of acts the terms "mistake" and "error"

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72. Report of the Working Group on the International Sale of Goods on the Work of its ninth session, *reprinted in* 9 Y.B. OF UNCITRAL 61 (1978) [hereinafter Report of UNCITRAL Working Group].

73. The International Institute for the Unification of Private Law (UNIDROIT) drafted the proposals on the doctrine of mistake. The proposals formed a part of UNIDROIT's draft law for the unification of certain rules relating to the "Validity of Contract of International Sale of Goods" (LUV). At its seventh session in 1974, UNCITRAL decided to consider the LUV draft for its own work. *Id.* at 65.

74. *Id.* at 62.

75. *Id.* at 66 (emphasis added).

76. *Id.*

77. *Id.*

78. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1-37 (N. Galston & H. Smit eds. 1984) [hereinafter INTERNATIONAL SALES].

include (i.e., is a party's misbelief regarding the quality of goods an error, or is error limited to mistakes concerning the identity of goods or a party?); and (2) in particular, the deliberations of the Working Group make clear that their rejection of the proposed mistake provision did not determine whether the rules of the Convention exclude the application of domestic provisions on error *vel non*.[79]

V. Application of the Convention to Factual Situations Invoking the Error Provision of OR Article 24(1) Subparagraph 4

To apply the Convention to the various factual situations set forth in the preceding section, one must assume that the parties' places of business are in different countries and that each country is a party to the Convention.[80] One must also assume that (1) the cases are not within the exemption provision of CISG article 2;[81] (2) the parties agreed on Zurich as the forum; and (3) the parties did not exclude application of the Convention to any of their contractual provisions.[82]

A. *Factual Situations Concerning the Quality of Goods*

Article 35 of the Convention addresses the issue of whether goods conform with a contract:

> 1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
>
> 2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (a) are fit for the purposes for which goods of the same description would *ordinarily* be used;
>
> (b) are fit for any *particular* purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except

79. Report of UNCITRAL Working Group, *supra* note 72, at 65-66.

80. CISG art. 1(1)(a).

81. CISG article 2 provides:

> 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. CISG art. 2.

82. CISG article 6 provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." CISG art. 6.

> where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.[83]

The Convention requires the qualities of delivered goods to comply with those specified in the contract.[84] A contractual description of the goods is necessary, therefore, to determine whether delivered goods conform.[85] Often, however, in the usual course of business parties do not expressly specify the qualities of goods; they may be unaware that a description of goods could become important, or they may simply believe that the products will comply with their expectations.[86]

Does CISG article 35 apply to the facts of the case involving the purchase of the Van Gogh self-portrait?[87] One must first examine the terms of the contract that concern the originality of the painting. The parties did not expressly state in the contract that the painting should be the original painting by Van Gogh.[88] The buyer had seen the painting in the seller's house, had believed it was an original painting by Van Gogh and had concluded the contract.[89] The seller then delivered the painting to the buyer. Did the seller perform the contract by delivering the painting the buyer had seen at the seller's house?

If a contract does not include a clause expressly setting forth terms concerning the quality of goods, one must interpret the terms by looking at the contract as a whole.[90] The Convention provides that for this purpose one must interpret the statements and conduct of a party "according to [the] . . . intent where the other party knew or could not have been unaware what the intent was."[91] If CISG article 8(1) is not applicable, then statements and conduct "are to be interpreted according to the understanding that a reasonable person . . . would have had in the same

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83. CISG art. 35(1), (2)(a)-(b) (emphasis added).

84. CISG art. 35(1).

85. Enderlein, *Rights and Obligations of the Seller under the UN Convention on Contracts for International Sales of Goods*, in INTERNATIONAL SALE OF GOODS, DUBROVNIK LECTURES (P. Sarčević and P. Volken eds. 1986); P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 67.

86. *See* J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 35, para. 225.

87. Judgment of October 16, 1962, *supra* note 19 and accompanying text.

88. *Id.*

89. *Id.*

90. Schlechtriehm, *The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES, *supra* note 78, at 6-20 [hereinafter Schlechtriehm, *The Seller's Obligation*]; *see also* Volken, *supra* note 51, at 32.

91. CISG art. 8(1).

circumstances."[92] To determine the intent of the parties or the understanding of a reasonable person, "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."[93]

How can one apply these standards to the contract in this case? The parties had agreed to a price that was reasonable for an original Van Gogh painting;[94] relevant experts referred to the painting as "Self-portrait of Van Gogh";[95] and evidence revealed that the seller had believed in the originality of the painting.[96] These facts indicate that the parties' understanding was that the contract covered an original painting by Van Gogh. The contract assumed the painting was genuine, and the seller was liable because the painting did not comply with this assumption.

This case indicates that the Convention addresses the same facts that trigger the Swiss error provision of OR article 24(1) subparagraph 4 and that form an error on a basic fact. CISG article 35 establishes the requirements for the nonconformity of goods.[97] If goods do not comply with a contract, the seller is in breach of contract,[98] and the Convention affords the appropriate remedies to the buyer in articles 45 through 52.[99]

What if the seller in this case had stated in good faith that the painting was the original "Self-portrait of Van Gogh"? Would this additional fact change the conclusion that the Convention applies? The statement of the seller would facilitate the interpretation of the contract. The parties would clearly have agreed on the seller's obligation to deliver an original Van Gogh painting. They would have made the originality of the painting an express part of the contract. Hence, this factual modification of the contract does not remove the case from the scope of the Convention. CISG article 35 still applies.

Imagine, however, that the seller in this case had known the painting was a copy and that the buyer, relying on the seller's misrepresentation, had entered into the contract. Would this additional element be relevant in determining the Convention's applicability? This hypothetical situation differs substantially from the previous scenarios because here the

92. CISG art. 8(2).
93. CISG art. 8(3).
94. Judgment of October 16, 1962, *supra* note 19, at 417.
95. *Id.* at 416.
96. *Id.* at 424.
97. *See supra* note 84 and accompanying text.
98. CISG art. 35.
99. Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. BUS. L. 346, 354-56.

sellers' willful deception induced the buyer to conclude the contract. The Convention addresses only some of the issues this hypothetical situation creates.

The delivered item, the copy of the original "Self-portrait of Van Gogh" would not conform with the quality standard to which the parties had agreed in their contract. The requirements of CISG article 35 would be met, and the buyer could rely on the remedies that CISG articles 46 through 52 provide. The application of CISG article 35 would, however, ignore the seller's willful deception about the originality of the painting. The question thus arises whether this additional element would create a situation that invokes domestic law rather than the Convention. The Convention must provide the answer to this question.

The Convention covers only the rights and obligations "arising from . . . [the] *contract.*"[100] A buyer's claim alleging fraud or willful deception would derive not from the contract but from the process of concluding the contract.[101] The Convention does not deal with this problem at all. It does not address this factual situation. Because this case puts into question the validity of the contract, CISG article 4(a) refers the issue to domestic law.[102]

B. *Factual Situations Concerning a Contract's Purpose*

The fitness of goods for an ordinary or a particular purpose forms a part of the contract.[103] CISG article 35(2) sets forth more specifically than does CISG article 35(1) the situations in which delivered goods do not conform to a contract.[104] CISG article 35(2) distinguishes between goods fit for an ordinary purpose[105] and those fit for a particular purpose.[106] If a buyer does not refer to a particular purpose, the seller warrants that the goods are fit for the purpose for which purchasers ordinarily use goods of a similar description.[107]

This section will examine the Convention's applicability to the second case referred to previously, in which the plaintiff bought a parcel of land to build a house but discovered he could not do so without spending

100. CISG art. 4(a) (emphasis added).

101. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 4, para. 65.

102. von Caemmerer, *supra* note 4, at 262-63; J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 4, para. 66; P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 32.

103. CISG art. 35(1). *See supra* text accompanying note 83.

104. *See supra* note 83 and accompanying text.

105. CISG art. 35(2)(a). *See supra* text accompanying note 83.

106. CISG art. 35(2)(b). *See supra* text accompanying note 83.

107. Schlechtriehm, *The Seller's Obligation*, *supra* note 90, at 6-20.

substantial sums to prepare the property for construction.[108]

In this case the buyer had purchased the piece of land in an area where zoning permitted the construction of homes. Under these circumstances one can only conclude that the parties had agreed to a sale of land suitable for the construction of a house.[109] The construction of a house was not possible, however, without the expenditure of large sums of money to prepare the land for construction, and the land was, therefore, not fit for the ordinary purpose of building a house. Under CISG article 35(2)(a) the land did not conform with the contract.

What if the buyer had purchased the property in order to build a series of multiple-family houses and had discovered the ground was not fit for this purpose, although it was fit for the construction of a one- or two-family house? This hypothetical situation is within the scope of CISG article 35(2)(b).[110] The intent to build a series of multiple-family houses is a particular purpose and not the ordinary purpose for buying a piece of land. A seller is obliged to deliver goods fit for a particular purpose only if the buyer has impliedly or expressly informed the seller of the special purpose.[111] The liability of a seller depends, therefore, on whether the buyer made its particular purpose known to the seller.[112]

The Convention addresses this type of scenario. According to the Swiss error rules, a buyer's mistaken idea about goods' fitness for a particular purpose meets the requirements of OR article 24(1) subparagraph 4 if the purpose is a necessary basis of the contract.[113] Again, the same facts that invoke the Swiss error provision would also trigger a rule of the Convention.

Consider, however, a similar case in which a buyer had purchased land on which to construct a house pursuant to specific architectural plans but, although the ground was fit for construction of the planned house, the municipal authority had rejected the buyer's application for a building permit because the planned house did not meet the specifications necessary for houses in the area.[114] The buyer had entered into the

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108. Judgment of March 14, 1961, *supra* note 28, at 137.

109. *Id.* at 139.

110. *See supra* note 83 and accompanying text.

111. CISG art. 35(2)(b). *See supra* text accompanying note 83.

112. Krapp, *Die Abkommen der Vereinten Nationen ueber den Kauf und ueber die Verjaehrung beim internationalen Warenkauf,* 1984 ZEITSCHRIFT FUER SCHWEIZERISCHES RECHT 290, 301; P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 67; Widmer, *Droits et obligations du vendeur,* CONVENTION DE VIENNE DE 1980 SUR LA VENTE INTERNATIONALE DE MARCHANDISES, *supra* note 51, at 97.

113. *See supra* notes 28-36 and accompanying text.

114. Judgment of June 17, 1969, *supra* note 41, at 407.

contract intending to build a particular house pursuant to specific plans. The buyer was unable to achieve his purpose because his plan for the construction of the house, and not the land itself, prevented the project from continuing.[115] In the previous hypothetical situation the buyer had been unable to realize his goal due to the quality of the land itself. In this case the buyer was unable to realize his goal not because of the land but because of his specific plans concerning the architecture of the house. Does CISG article 35(2)(b) recognize such a distinction? Is a seller liable if the buyer cannot use the goods because of an additional factor such as specific plans for a house?

The Convention provides an answer. CISG article 35(2)(b) addresses the problem of goods that are unfit for a buyer's particular purpose. Under this article a seller may be liable for the nonconformity of goods if, at the time the parties concluded the contract, the buyer expressly or impliedly informed the seller of the particular purpose for which it intended to use the goods.[116] If a seller is aware of this particular purpose, then it has a contractual obligation to deliver goods fit for this purpose.[117] If the buyer cannot use the goods for the particular purpose, it can claim nonconformity of the goods based on CISG article 35(2)(b).[118] The Convention deals, therefore, with the factual situation this case presents, which under Swiss law may invoke the error on a basic fact provision.

These two cases and the hypothetical situation illustrate that the Convention and the Swiss error provision deal with the fitness of goods for both ordinary and particular purposes. The two legal systems approach the various factual situations differently, however.

The Convention establishes various criteria for imposing liability on a seller depending on whether the buyer wanted to use the goods for an ordinary or a particular purpose. Unless there is an agreement to the contrary, a seller is contractually obligated to deliver goods for the purpose for which purchasers ordinarily use goods of the same description.[119] A seller's liability extends to the fitness of goods for a particular purpose if, and only if, the buyer impliedly or expressly informed the seller of the purpose at the time they concluded the contract.[120] The com-

115. *Id.*

116. CISG art. 35(2)(b). *See supra* text accompanying note 83.

117. Enderlein, *supra* note 85, at 156; Krapp, *supra* note 112, at 301; Schlechtriehm, *The Seller's Obligation*, *supra* note 90, at 6-21; P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 67.

118. CISG art. 35(2)(b). *See supra* text accompanying note 83.

119. CISG art. 35(1). *See supra* text accompanying note 83.

120. CISG art. 35(2)(b). *See supra* text accompanying note 83.

munication between the parties becomes crucial, therefore, because it defines a seller's liability for a particular purpose. CISG article 35(2)(b) implies that a buyer should only receive protection where the goods are not fit for a particular purpose that it made known to the seller.[121]

The rules in CISG article 35 emphasize the importance of the contract because a seller's liability for the conformity of goods depends on the contractual terms.[122] A seller is liable if goods do not conform to their description in a contract.[123] In addition, a seller is liable if the buyer cannot use the goods for their ordinary purpose.[124] He also is liable for their particular purpose if the buyer made it known to the seller[125] or created an understanding about the particular purpose of the goods.[126] To determine the terms on which parties agreed and what facts a buyer revealed to the seller may be difficult, however. To resolve these problems the Convention provides the interpretative rules of CISG article 8.[127]

Pursuant to the Swiss provision of OR article 24(1) subparagraph 4, a party's mistaken idea about goods' fitness for an ordinary or a particular purpose constitutes a material error on a basic fact if the purpose is a necessary basis of the contract.[128] The materiality of the error does not depend, however, on the communication between the parties. A buyer may receive protection regardless of whether he revealed to the seller his purpose for buying the goods.[129] The Swiss error rules do not require a seller to have knowledge of the buyer's mistake.[130] In other words, the materiality of an error is independent of the other party's knowledge.[131]

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121. *Id.*

122. P. SCHLECHTRIEHM, EINHEITLICHES UN-KAUFRECHT, *supra* note 4, at 56; P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 67-68.

123. CISG art. 35(1). *See supra* text accompanying note 83.

124. CISG art. 35(2)(a). *See supra* text accompanying note 83.

125. CISG art. 35(2)(b). *See supra* text accompanying note 83.

126. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 35, para. 226.

127. *See* Schlechtriehm, *The Seller's Obligation*, *supra* note 90, at 6-20.

128. OR art. 24(1) subpara. 4.

129. H. GOLTZ, MOTIVIRRTUM UND GESCHAEFTSGRUNDLAGE IM SCHULDVERTRAG 81-82 (1973).

130. *Id. See also* OR art. 24, *supra* note 8.

131. Under the Swiss warranty provisions of OR articles 197 through 210 the seller is liable if the goods are not fit for their ordinary use. The seller's liability extends to a particular purpose for which the buyer wants to use the goods if the seller impliedly or expressly had affirmed the conformity of the goods for this purpose. In practice, however, the buyer might have difficulty relying on the warranty provisions. First, the statute of limitations bars claims against the seller made more than a year after the buyer has received the goods. Second, proving that the seller impliedly or expressly affirmed the

C. *Factual Situations Concerning Future Events*

As the previous section demonstrated, CISG article 35(2) holds a seller liable if the buyer cannot use the goods for their ordinary or particular purpose. The question arises, however, whether the Convention still governs when a buyer's ability to use the goods fails because of an event occurring after both settlement of the contract and delivery of the goods.

CISG article 36 provides:

> 1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent *only after that time.*
>
> 2) The seller is also liable for any lack of conformity which occurs *after the time* indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a *breach of any guarantee* that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.[132]

This section will examine the Convention's applicability to the case where the buyer applied for a license to run a restaurant immediately after purchasing a restaurant, but the local authorities rejected his application.[133] The reason for the rejection, the lack of demand for an additional restaurant, existed at the time the risk passed to the buyer.[134] The nonconformity of the goods became apparent, however, only after that time. The Convention resolves this problem in two steps: first, it asks whether the goods conform to the contract;[135] second, it examines whether the seller's undertaking continued after the risk passed to the buyer.[136]

Assume the facts of the case were changed as follows: The buyer purchased a parcel of land intending to build and operate a restaurant. The buyer completed construction of the restaurant two years after he purchased the land. He then applied for a permit to operate the restaurant

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fitness of the goods for a particular purpose might be difficult. The Swiss Supreme Court allows the buyer to rely alternatively on both the error provision and the warranty relief provision if the requirements of both provisions are met. *See, e.g.*, Judgment of June 22, 1982, BGE 108 II 102, 104.

132. CISG art. 36 (emphasis added).

133. Judgment of July 9, 1929, *supra* note 31.

134. *Id.* at 185.

135. CISG art. 35. *See supra* text accompanying note 83.

136. CISG art. 36(1). *See supra* text accompanying note 132.

but the local authorities rejected his application. Assume that the seller knew the buyer's plans.

The Convention also addresses this factual situation. Under CISG article 36(2) a seller is liable for nonconforming goods but only if he has given a guarantee for a period of time that the goods will "remain fit for their ordinary purpose or for some particular purpose."[137] As a result of this guarantee, a seller is liable for the fitness of goods for an ordinary or a particular purpose for a longer period than under CISG article 36(1). CISG article 36(2) addresses the question of the extent to which a future event, i.e., a fact arising after the risk passed to the buyer, can trigger a seller's liability.[138] The Convention also stresses with respect to this issue the importance of the contract. A seller's liability for conformity of goods is extended if, and only if, the parties agreed to a guarantee clause in their contract.[139]

D. *Factual Situations Concerning a Contract's Legal Basis*

Does the Convention address the factual situation that arose in the case where the plaintiff challenged a contract to buy shares of stock in a corporation that had been improperly incorporated?[140] The parties did not expressly stipulate that the company should comply with the legal requirements for incorporation as a prerequisite to sale of its stock.[141] Based on an interpretation of the contract under CISG article 8, however, an implicit understanding arose that the company conformed to the legal requirements.[142] The shares of a company that bear the risk of invalidation are, therefore, not of the quality that this contract re-

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137. CISG art. 36(2). *See supra* text accompanying note 132.
138. *Id.*
139. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 36, para. 243.
140. Judgment of September 13, 1917, *supra* note 46.
141. *Id.* at 487-88.
142. CISG article 8 reads:

(1) For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. CISG art. 8.

quired.[143] This factual situation invokes the rules of the Convention.

VI. Relation Between the Convention and the Swiss Error Provision of OR Article 24(1) Subparagraph 4

A. *Exclusive Application of the Convention*

The above examination of several factual situations that involve a material error under Swiss law pursuant to OR article 24(1) subparagraph 4 revealed that the Convention covered each of the situations. The question remains, however, as to which law should apply in these cases, the Convention or Swiss contract law? The Convention should prevail over domestic law for several reasons.

Within a defined scope the Convention forms the uniform law for international sales. The Convention's main purpose is to provide uniformity.[144] The Convention should apply exclusively, therefore, to all issues it addresses unless the Convention explicitly states or the parties agree otherwise. Any application of domestic law to an issue the Convention addresses would jeopardize the Convention's function.[145]

The desire for uniformity also governs whether one can apply OR article 24(1) subparagraph 4 in the cases discussed above. Because the Convention addresses all the cases presented, it should apply exclusively. Only one argument exists in favor of applying domestic law. According to CISG article 4(a), the scope of the Convention excludes questions concerning the validity of a contract.[146] A buyer's mistake concerning a certain fact when concluding a contract constitutes an error.[147] The issue of error is a question of the validity of the contract, which CISG article

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143. CISG art. 35(1). *See supra* text accompanying note 83.

144. The preamble to the U.N. Convention on Contracts for the International Sale of Goods provides:

> THE STATES PARTIES TO THIS CONVENTION, . . .
>
> BEING OF THE OPINION that the adoption of 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,
>
> . . . .

19 I.L.M. 671 (1980).

145. J. Honnold, Uniform Law, *supra* note 4, art. 35, para. 240; Schlechtriehm, *Diskussionsbeitraege*, in Das UNCITRAL-Kaufrecht im Vergleich zum Oesterreichischen Recht, *supra* note 51, at 92.

146. CISG art. 4(a). *See supra* text accompanying note 3.

147. *See supra* note 9 and accompanying text.

4(a) refers to domestic law.[148] But is such an interpretation of the term "validity," as CISG article 4(a) uses it, correct?

CISG article 4(a) and its use of the term "validity" do not exclude the discussed factual situations from the scope of the Convention. First, it is not feasible to decide in a general way that the term "validity" includes error. The term "error" itself describes many different situations that the Convention may not address. On the other hand, the Convention may address problems that a domestic legal system labels as "error."[149] As shown above, several different provisions of the Convention address the factual situations that under Swiss law involve an error on a basic fact. Neither the term "validity" nor the term "error" determines whether the Convention is applicable to a certain problem.[150] Conversely, one must construe the term "validity" in light of the Convention as a whole. If the Convention addresses a problem concerning the quality of goods, it is not logical to argue that CISG article 4(a) simultaneously excludes application of the Convention. Because the Convention does not define "validity," it is, therefore, open to different interpretations.[151]

B. *General Policy Justifications*

Several factual situations trigger both the rules of the Convention and the Swiss provision concerning errors on a basic fact. If the Convention did not apply exclusively to such situations, what would the relationship be between the Convention and the Swiss provisions? Arguing that the Swiss error provisions could apply to questions of a contract's validity would create a statute of limitations dispute. Under Swiss contract law, an erring party may declare a contract void within one year after discovering the error or within ten years after the conclusion of the contract, whichever period expires first.[152]

Under the Convention the buyer "loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at latest *within a period of two years from the date on which the goods were handed over*" to him.[153] A buyer can extend the two-year-period only "if he has a reasonable excuse for his failure to give the required

148. CISG art. 4(a). *See supra* note 3.

149. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 35, paras. 238, 240; P. SCHLECHTRIEHM, UNIFORM SALES LAW, *supra* note 4, at 32-33.

150. J. HONNOLD, UNIFORM LAW, *supra* note 4, art. 4, para. 66; *see* Rosett, *supra* note 51, at 280.

151. *See* Rosett, *supra* note 51, at 280.

152. OR art. 31. *See supra* notes 13-15 and accompanying text.

153. CISG art. 39(2) (emphasis added).

notice."[154] If the Swiss law error provisions were applicable to the cases that the Convention addresses, the parties would bear the risk that even after the two-year period the other party could challenge a contract under Swiss law. Claims based on the Convention would be forfeited.

The Convention, as a uniform sales law, should protect the parties from the risk that domestic law remedies could nullify its effect. Parties contracting under the Convention should be assured that the Convention will resolve all issues within its scope. An exclusive application of the Convention is the only way to achieve this goal.

C. *Domestic Law Justifications*

One might be surprised from a domestic law viewpoint to discover that all the factual situations this Article examined involve questions that fall under Swiss law and lie within the scope of the Convention. An examination of criteria that determine the application of OR article 24(1) subparagraph 4 provides an explanation for this anomaly.

A basic tenet of the Convention is that parties must set forth in a contract their rights and obligations.[155] The meaning of a contract is, therefore, crucial. Parties should include in a contract such elements as the quality and quantity of goods, the purpose for which goods are purchased and guarantees to give the purchaser the right to claim nonconformity of the goods. Under Swiss law a buyer's claim based on OR article 24(1) subparagraph 4 depends on whether the error is material.[156] The Swiss Supreme Court has developed a three-part test to determine materiality.[157] The second part of the test focuses on whether the erroneous fact is "in accordance with the rules of good faith in the course of business, considered to be a *necessary basis* of the contract."[158] The more significant the erroneous fact is to the contract, the more likely a court will consider the error to be material. If one is to consider a certain fact to be a very important basis of a contract, however, it is quite likely that the Convention's contract interpretation rules will establish that this particular fact is part of the contract. It is not surprising, therefore, that both the Convention and Swiss contract law address issues such as the conformity of goods with a contract. Whereas the Convention addresses questions concerning the quality of goods specifically and exclusively as an issue of conformity, Swiss contract law deals with it, *inter*

154. CISG art. 44.
155. *See supra* notes 120-26 and accompanying text.
156. OR arts. 23, 24(1). *See supra* notes 8-9 and accompanying text.
157. *See supra* notes 16-18 and accompanying text.
158. *See supra* note 17 and accompanying text (emphasis added).

alia, by the error on a basic fact provision.

VII. CONCLUSION

This Article has focused on the Convention's impact on the Swiss rule concerning errors on a basic fact. Although CISG article 4(a) refers issues of contract validity to domestic law, a factual situation that raises a question of error under Swiss law may not be a question of validity under the Convention. The Convention rather than domestic law has to interpret the term "validity" as CISG article 4(a) uses it. The Convention addresses the most typical factual situations involving an error on a basic fact pursuant to OR article 24(1) subparagraph 4. As a uniform sales law the Convention should govern exclusively all issues it addresses. To the extent the Convention deals with factual situations that the error provisions of Swiss law cover, it should displace the Swiss provisions.

From a practical standpoint exclusive application of the Convention has the greatest effect on the Swiss statute of limitations. An erring party is entitled to challenge a contract under OR article 24(1) subparagraph 4 until the end of a ten-year period after the conclusion of the contract or within one year after discovering the error.[159] The Convention generally bars a party from doing so after two years from the time the goods were delivered.[160]

The terms of an agreement determine the parties' rights under the Convention. It is crucial, therefore, for parties to integrate their specific requirements into the contract. If, for instance, a party should be held liable for an extended period, a guarantee should explicitly stipulate this fact. The Convention focuses on contracts in order to provide parties with a reliable and clearly defined contractual relationship. By displacing the error provision of OR article 24(1) subparagraph 4 for any situation the Convention governs, therefore, parties do not bear the risk of being confronted by an unexpected claim under the terms of their agreement.

159. OR arts. 31 and 127. *See supra* notes 13-15 and accompanying text.
160. CISG art. 39(2). *See supra* note 153 and accompanying text.