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## Panel Discussion: A Hypothetical Case Involving Commercial Litigation in the Sale of Insulation from a U.S. Firm in Kansas to a Purchaser in Monterrey, Mexico

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**PANEL DISCUSSION: A HYPOTHETICAL CASE INVOLVING  
COMMERCIAL LITIGATION IN THE SALE OF INSULATION FROM A  
U.S. FIRM IN KANSAS TO A PURCHASER IN MONTERREY, MEXICO**

**MODERATOR: PROF. JOHN SPANOGLE**

**PANELISTS: CHRIS BAUMAN, ESQ., PROF. FRANKLIN GILL,  
LIC. CARLOS LOPERENA, DR. LEONEL PEREZNIETO.\***

**HYPOTHETICAL:** Officers of Universal Pipe, Inc. (hereafter, “Universal”), a small Kansas manufacturer of pipe insulation, attend an international trade fair in New York, where they meet an agent of Mexabuilders, S.A. (hereafter, “Mexa”), a builder of industrial facilities from Monterrey, Nuevo León, Mexico. Mexa is interested in Universal’s insulation for use in a refinery in Monterrey. Universal’s representative gives Mexa’s agent a price list that states that Universal’s “Standard Pipe Insulation Product A” is priced at U.S. \$200 per 100 pounds, “free on board” (F.O.B.) Kansas City.

One month later, Mexa sends Universal a telefaxed Purchase Order Form stating, “We order today 5,000 lbs. Universal Standard Pipe Insulation Product A for U.S. \$10,000 F.O.B. Kansas City for immediate delivery to Monterrey, Mexico” (signed by an authorized Mexa officer).

That same day, Universal responds by faxing one of its standard Order Acknowledgment Forms to Mexa’s office. That form states, “We accept your order to buy 5,000 lbs. Universal Standard Pipe Insulation Product A for U.S. \$10,000 F.O.B. Kansas City. Goods sold as is and with all faults (see UCC § 2-316). This contract is governed by the laws of Kansas” (signed by an authorized Universal agent).

Within one week, Universal ships the goods and bills Mexa. Mexa accepts the goods and pays for them. Mexa uses the insulation in constructing the refinery. The insulation corrodes the metal of the refinery piping. The piping that is used is governmentally mandated and customarily used in all such facilities in Mexico. Universal has sold its product throughout the United States and Canada, and has never encountered a similar problem before. However, the type of piping used in the United States and in Canada contains different critical alloys. Mexa incurs a U.S. \$2 million loss due to the corrosion of the refinery piping. There is some question as to whether the standard commercial insurance of either Mexa or Universal covers the loss, because the insulation may not necessarily be “defective,” but might instead only be “unsuitable.” Thus, any damages might not arise out of product liability concepts in torts, which are more likely to be covered by such insurance, but rather might arise out of breach of contract concepts, which are less likely to be covered by such insurance.

**JOHN SPANOGLE:** This is a simple problem. It contains the battle of the forms taught in a typical first-year course on contracts law. This time, however, we have put one party in a different country. The buyer sends a telefax saying, “We order standard pipe insulation for U.S. \$10,000.” The seller replies, “We accept your order, goods sold as is, with all faults, governed by the laws of Kansas.” As usually

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\* The views expressed here are those of the panelists and should not be interpreted to represent the views of their employers or other organizations with which they may be affiliated. A short biography of each panelist appears on the last page of this discussion.

happens, neither party reads anything other than “we order,” the amount and the price, on one side, and “we accept” and the amount and the price, on the other. So the goods get shipped, and the goods are received and accepted and paid for, and payment is accepted. Then the goods are used, and the refinery falls down because of the insulation.

First, assume Mexican law applies, and you have two messages sent, one saying “we order,” and the response that says “we accept” but the goods are sold as is, etc. Have you formed a contract with that exchange of messages under Mexican law?

**CARLOS LOPERENA:** When the intent of the parties coincides, there is a “meeting of the minds” and there is a contract. However, the process of establishing evidence to prove the existence of a contract is a different matter. If we find that there is a meeting of the minds on certain terms, there is a contract. If there is no mirror-image offer and acceptance, then there is no contract. There is an offer and a counteroffer. In other words, an “acceptance” that does not coincide on all points with the offer is a counteroffer, not an acceptance, and there is no contract. The original offer no longer exists because that offer was not accepted, so no contract was formed. But then we have a counteroffer, and it is open to be accepted by the other party.

**CHRIS BAUMAN:** Lic. Loperena, if I understand what you are saying correctly, if there is an offer and then there is a counteroffer, and the counteroffer is a mirror counteroffer on some of the terms but not all of the terms, then under Mexican law, to the extent that there is a mirror image of those terms, there is a contract, but the additional terms would not be considered part of a contract?

**LOPERENA:** If the offer has five terms, and those five terms are accepted, there is a contract. If the answer accepts only three of the five terms, you have a counteroffer that needs to be accepted by the other party. If it is not accepted, there is no contract.

**BAUMAN:** What if the two items that were not accepted were in fact not material? Is there a materiality standard? In other words, does a variation of terms that are not material in the response, to avoid the word “counteroffer,” make a difference under Mexican law?

**LOPERENA:** No. I think it is necessary to have full acceptance. If there is not full acceptance, the response is a new offer.

**LEONEL PEREZNIETO:** And there is another point that you mentioned. There are five terms in the original offer; there is an acceptance of those five terms, or a “meeting of the minds.” But the other party asks for three more terms. My opinion is that there is a contract on the first five terms. The other three terms are a counteroffer, which would still have to be accepted by the other party.

**SPANOGLE:** But there was a contract as to the first five terms. And those dealt with, let us say, the quantity, price, and identification of the goods. What happens if the other side does not accept the other three items?

**PEREZNIETO:** No problem. There is no contract on those three terms, but there is a meeting of the minds and a contract on the first five terms.

**SPANOGLE:** Suppose the offer has five terms and an implicit sixth term. For example, an implicit term that we would call an implied warranty of quality. That is, there is a description of the goods that says they will perform as the goods should perform. And the counteroffer says: We will accept your first five points but not the implicit sixth point. We disclaim all warranties. Do you have a contract under Mexican law?

**PEREZNIETO:** Well, you have a contract on the five basic points, and the warranty affects the first five. I think that we have to discuss the manner in which the warranty affects the merchandise.

**SPANOGLE:** The problem, of course, is that the goods do not operate as they should, and I want to know what the terms are of the contract that we have just formed. Does the contract have this implicit warranty term, or has the warranty been disclaimed?

**PEREZNIETO:** I see two different issues. One is that we agreed on the five terms on merchandise, which under standard conditions should perform well. If this merchandise does not work, it is defective. If the sixth term is a warranty, you have to cover me without the warranty because you offered me something that under normal conditions had to work.

**BAUMAN:** Under Mexican law, the *Código de Comercio* (Commercial Code),<sup>1</sup> are there requirements creating implied warranties of merchantability and suitability for the purpose for which the goods were intended, or something comparable? Is there that kind of recognition of implied warranties in the Mexican law that there is in the Uniform Commercial Code (UCC)<sup>2</sup> in the United States?

**PEREZNIETO:** It is not only in the Commercial Code; it is also in the Federal Code, which applies to commercial matters as the supreme law of Mexico.

**FRANKLIN GILL:** The *Código de Comercio* in Mexico is a federal law that is obligatory throughout Mexico, is it not? This is a major advantage, in my view, of the Mexican system in place of the unfortunate *Erie Railroad vs. Tompkins* decision.<sup>3</sup>

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1. CÓDIGO DE COMERCIO, D.O., 15 de septiembre de 1889 [hereinafter CÓDIGO DE COMERCIO].

2. UNIFORM COMMERCIAL CODE (revised 2001) [hereinafter UCC].

3. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Editor's note: Some scholars regard the *Erie* doctrine as "unfortunate" in that it creates a tension between state and federal law, in terms of the sources of procedural and substantive law, that undermines the uniformity of law. See Stephen C. Yeazell, *Civil Procedure* 261-303 (5th ed. 2000). Professor Spanogle, on the other hand, views the *Erie* doctrine more favorably, because it allows the states to experiment with new ideas that federal judges cannot summarily ignore. This local option is especially necessary in the area of consumer law.

**PEREZNIETO:** In the Federal Civil Code we have the *Acción Pauliana* (Pauliana Action) that comes from the Romans. The Pauliana Action permits the purchaser to bring a legal action when there is a hidden defect in merchandise. The purchaser does not need a warranty. The contracting parties agree that certain standard merchandise will work normally under standard conditions. If this merchandise does not work, then the Federal Civil Code provides a right of action. The complaining party could exercise an *Acción Pauliana* in order to make a claim for this defective merchandise.

**GILL:** Even though there is no express provision to that effect in the *Código de Comercio*.

**SPANOGLE:** Can you put in the contract that you do not guarantee that it has fitness for any particular use, that you do not know whether it will work or not? In other words, can you disclaim the guarantee?

**PEREZNIETO:** No buyer would agree to that condition.

**SPANOGLE:** Can you sell a used car and say that, because it may not run, buyer beware?

**PEREZNIETO:** I think that if you buy a used car and it is supposed to run—because that is the main objective of a car—and then it does not run, it is defective.

**SPANOGLE:** Can you sell a car if no one knows whether it will run or not? For example, a car that has been under water and both buyer and seller are unsure whether it will run or not.

**PEREZNIETO:** Your example is very good because in this case, we are thinking of the merchandise. I am buying this car as a used car, and the use of the car is to run, to move, to transport. If the object, the thing, the merchandise that I buy with this purpose, does not accomplish the purpose that I am seeking, I could say that it is defective.

**LOPERENA:** The main idea, when you buy something in Mexico under Mexican law, is that the goods you are acquiring are to be used for the ordinary use that is intended. But you may buy a car that does not run because you are going to use it for decorative purposes, even without an engine. But you have to be very clear as to the purpose of the acquisition. If the purpose is not established precisely, it is understood that you are going to use the car for the ordinary use employed by a reasonable person. You may get it for decorative purposes, but if you are not using it for the ordinary purpose, you have to establish it in the contract. Otherwise, it has what we call hidden defects.

**SPANOGLE:** Can you get around the ordinary purpose requirement by using the words “as is”?

**PEREZNIETO:** I buy it as it is, but if I have not analyzed the merchandise, I assume that it is suitable for the purposes for which I am going to use it. I do not know. Returning to the hypothetical, I do not know if the Kansas company must know the law that is used in pipelines in the Mexican factory or if it is different from the Canadian or American pipelines, or whether the Monterrey company has to know how the insulation produced in Kansas affects the metallic composition of the pipelines in Mexico.

**GILL:** The question is, what if the car runs in the United States but does not run in Mexico? This raises the issue in the hypothetical regarding the composition of the pipe. The insulation caused the pipes to corrode. That raises some interesting questions that we will get into when we talk about laws regarding contributory negligence and duties of inspection.

**SPANOGLE:** We had an offer, and then we had a counteroffer, and the offer was terminated by the counteroffer because it was not a mirror image. When the goods are shipped and accepted and received and paid for, there is obviously a contract formed. How was it formed?

**LOPERENA:** If I receive the merchandise F.O.B. in Kansas, I assume that a Monterrey company is transporting the merchandise from Kansas to the Mexican border and then to Monterrey. Mexa has the chance to see the merchandise, to verify the quantity, maybe review the quality, and take it to Mexico. If after that, in a given period of time (five days), Mexa does not reject the merchandise, under Mexican law they cannot reject it anymore. If Mexa eventually pays, then they are accepting the merchandise as it was, as long as they did not reject Universal's telefax message listing the conditions for sale. Let us assume Mexa did not accept these proposed conditions, but they received the merchandise and paid for it. In my opinion, this is evidence that Mexa accepted the merchandise as it was and with the conditions set in the telefax.

**SPANOGLE:** So one approach to Mexican law is to say: offer, counteroffer, and acceptance of the counteroffer by acceptance of the goods. That is technically known as the "last-shot" doctrine. A different approach to Mexican law is to say we had an offer and at least a partial acceptance, and the extra terms in the acceptance are proposals for modification, and they drop out if they are not accepted. There are two different approaches to how Mexican law would look at this particular transaction that would form the contract on different terms. Lic. Loperena would form the contract on the terms of the counteroffer. Dr. Pereznieto's approach would form it on the terms of the offer. So, even under one legal system, we have differences of opinion and two different approaches to the analysis.

Let me switch for just a moment. Under U.S. law, absent the UN Convention on Contracts for the International Sale of Goods (CISG),<sup>4</sup> would a contract be formed under these facts? If so, how is the contract formed under U.S. law?

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4. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter CISG].

**BAUMAN:** The first thing to note then would be that you have two merchants, and under the UCC, to the extent that the counteroffer has materially changed the offer, it would not be binding on the original offeror. In our case, the attempt to limit the warranty would be a material change under the UCC, so at least that portion of the counteroffer would not be binding on the offeror. But then the other issue is whether or not a contract was formed by virtue of the acceptance of the goods, and under the UCC a purchaser has the duty to inspect within a reasonable period of time and to reject those goods. Of course, that is fact-specific. In this case, I think there are some good arguments you could make on both sides. You could make the argument that the Mexican purchaser had an opportunity to inspect the goods both before and after the purchase. They saw the goods exhibited at a trade show prior to purchase. Mexa purchased the goods and again had a duty and an opportunity to inspect them after the purchase. On the other hand, you could make the argument that because this insulation was used to insulate pipes in the construction of a refinery, the Mexican purchaser did not have an opportunity to inspect the goods as incorporated in the final product. Under the UCC, you could argue that the inspection somehow was deferred until later. Then you could raise the latent defect issue and question when the Mexican purchaser was under an obligation to reject the goods. You could argue that the obligation to reject arose later, once Mexa noticed the corrosion due to the unique features of the piping.

**SPANOGLE:** Okay. The basic concept is that, although Mexa's response is an acceptance, any additional terms are just proposals for a modification. That sounds a lot like Dr. Pereznieta's approach to Mexican law, but there is one other question: Can you disclaim warranties under the UCC?

**BAUMAN:** If the disclaimer is in a counteroffer, it would be a material alteration of the offer, and therefore would not be permitted under the UCC. In this case, there were two additional terms that were added in the counteroffer. There was the term that attempted to limit the warranty and there was also the addition of the choice of law provision. I do not know whether the choice of law provision is also a material alteration. If it is deemed not to be a material alteration of the original offer, then, because it is between merchants, under the UCC, it would be binding on the offeror.

**GILL:** Mr. Bauman, UCC § 2-316<sup>5</sup> provides that language to exclude all implied warranties of fitness is sufficient if it states, for example, that there are no warranties that extend beyond the description on the face hereof, and it goes on to say expressly that all implied warranties are excluded by expressions such as "as is," or "with all faults." So the express language of the UCC seems to me to authorize the offeree to exclude those otherwise implied warranties. Is it simply a materiality question?

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5. UCC, *supra* note 2, § 2-316, para. 3 ("Notwithstanding subsection (2)(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.").

**BAUMAN:** Section 2-207 of the UCC talks about when and under what circumstances additional terms are included in an acceptance and are binding on the offeror. The UCC makes it clear that additional terms can be binding on the offeror unless they materially alter the offer.<sup>6</sup>

**GILL:** But in the face of express language permitting the exclusion, who decides what is material in these circumstances? Assume that you are coming before a U.S. federal court.

**BAUMAN:** Well, you could look at the CISG, by way of analogy, where it clearly states that any attempt to limit warranties or guarantees is a material alteration. And then you would have to look at case law to see how that has been decided. But I think under normal circumstances, an attempt to limit or eliminate any kind of warranty is a material alteration. But that is what you would be arguing, that it is a material alteration and therefore it is not binding. But I agree with you that the issue would be decided on whether or not it indeed is material or not.

**GILL:** So it comes back to the common law, a decision for the courts?

**SPANOGLE:** I think we agree that it is possible in certain circumstances to disclaim warranties. The question is, will this disclaimer be incorporated in the contract under UCC § 2-207?<sup>7</sup> Comment 4 to § 2-207<sup>8</sup> speaks to what is a material alteration. It rather specifically includes disclaimers of warranties as a material alteration. So you are both right. Prof. Gill is right that you can disclaim warranties. Mr. Bauman is right that it will not work in this particular instance because the disclaimer is a material alteration.

Contrast that with what seemed to be an agreement by both Dr. Perezniето and Lic. Loperena that under Mexican law it was very difficult to disclaim warranties that goods were fit for ordinary use—that you might have to do something more than just simply say “as is.” Dr. Perezniето is fairly sure that you cannot do that. Lic. Loperena is just a little more ambiguous about it.

**PEREZNIETO:** Well, I think guarantees can be disclaimed. It is a matter of offer and acceptance. In commercial matters, the freedom to enter a contract or a given clause is almost absolute. We have a very liberal commercial code and if the purchaser accepts no guarantees, I think it is legal.

**SPANOGLE:** Can you sum up where we are at this point? Does it matter whether we use Mexican law or Kansas law as to what the terms of the contract are?

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6. UCC, *supra* note 2, § 2-207, para. 2 (“The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”).

7. *Id.*

8. *Id.*, cmt. 4.



**PEREZNIETO:** Well, in our case, it is clear that there is reference to the law of Kansas. The offeree sold the goods as is, and with all faults. This contract is governed by the law of Kansas. I do not see that there is too much to say about that because it is the law of Kansas that will be applicable.

**GILL:** But that is because the contract was formed by acceptance of the goods by the Mexican party. Is that right? That is the act that sealed the contract.

**PEREZNIETO:** Yes. Furthermore, the UCC in the United States creates uniform commercial terms between the different states of the United States. It applies, from my point of view, with more reason in the case that we are talking about because this is an international sale of goods. Which law will apply? The UCC applies for international contracts.

**SPANOGLE:** Well, the UCC is still state law, not federal law. The UCC is the law of Kansas.

**PEREZNIETO:** I know, but it is a uniform law.

**SPANOGLE:** That raises an interesting question. That is fine if you have formed the contract. But suppose you are still trying to figure out whether you have in fact formed a contract. Do you use Mexican law or American law to form the contract?

**PEREZNIETO:** I think I am going to use the Vienna Convention (CISG) to form the contract. Article 1 of this Convention applies to contracts for the sale of goods between parties whose places of business are in different states when the states are contracting states.<sup>9</sup> So we have a false conflict. If the choice of law of one of the parties is Kansas law, and the other party did not mention what is its choice of law, then the law of Kansas applies. The Convention (CISG) is the law of Kansas because the United States is a party to the Convention.

**LOPERENA:** I agree. But what Prof. Spanogle says is very interesting. Let us move away from the Vienna Convention. What is the law applicable for the formation of the contract? Mexican law says, in the Federal Civil Code (*Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal*), that the applicable law is the law of the place of execution.<sup>10</sup> That is, the place of contract formation. In this case, there is one rule: where the contract was concluded. According to the Mexican law, the contract was concluded in the place where the offer was accepted, which was Kansas.

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9. CISG, *supra* note 4, art. 1, para. 1 ("This Convention applies to contracts for the 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.").

10. CÓDIGO CIVIL PARA EL DISTRITO FEDERAL EN MATERIA COMÚN Y PARA TODA LA REPÚBLICA EN MATERIA FEDERAL, D.O., 26 de mayo de 1928 [hereinafter CÓDIGO CIVIL].

**GILL:** What a minute. I thought you said there was an acceptance of the contract by the performance in Mexico. That is, performance by acceptance of the goods in Mexico.

**PEREZNIETO:** No, there are two things. Let us go step by step. According to the Mexican law it is the place, as Lic. Loperena said, the law of the place where the contract was concluded. That is the controlling principle. In this case, we should ask where the contract was concluded. The company was based in Kansas, and that is where they received the offer and the offer was accepted.

**SPANOGLE:** How do you know that is where the offer was accepted?

**PEREZNIETO:** As I read the problem, there was an offer and there was an acceptance.

**SPANOGLE:** So you believe that the responsive message is an acceptance?

**GILL:** Even though there were qualifications, material changes with regard to both the warranties and the governing law?

**PEREZNIETO:** We are talking about two different issues. We are talking about the formality of the formation of the contract, which derives from the question of capacity. And questions of capacity for us are very important under Mexican law. Does the agent who performs the offer have the capacity to make binding contracts before his representee?

**SPANOGLE:** Under Mexican law, is an acceptance effective upon receipt or upon dispatch?

**PEREZNIETO:** Mexican law has the same terms as the Vienna Convention (CISG) in that case. In the Vienna Convention and in Mexican law, the perfection of this kind of contract will occur at the moment the offeror receives the response from the offeree.

**SPANOGLE:** And the offeror is based in Mexico, and he receives the offer in Mexico, so where is the contract concluded?

**PEREZNIETO:** In that case, it is presumed to be in Mexico. We are talking about Mexican law and forums.

**SPANOGLE:** And of course, as all first-year American contract students learn, under American law an acceptance is effective upon dispatch. So under American law, the contract is concluded in Kansas; under Mexican law, the contract is concluded in Mexico. Now we have an interesting problem, because until you decide what law applies, you cannot even decide how and where the contract was concluded. All right, where do we go from here?

**LOPERENA:** By the way, we have not defined first what is the valid contract. Is it the one based on the first offer or the one based on the counteroffer?

**SPANOGLE:** I know. At this point we have fifteen levels of ambiguity. That is all. No more. Let me try to start from a different perspective. What choice of law rules would a Mexican court use in this case? What is the source of choice of law rules?

**LOPERENA:** If the Mexican court decides that the contract was concluded in Mexico, it is going to apply the federal civil rules of conflict.

**PEREZNIETO:** I think the Mexican judge will always apply the Mexican code, regardless of the choice of law provisions, because they are used to applying their own law. It is simpler, easier, and the only law that they know.

**GILL:** I was puzzled by your reference to the Civil Code as regulating the question of the standard for conclusion of the contract. It was my understanding that the Commercial Code controls the formation of a contract between merchants. I am a little puzzled about how the Civil Code supplements the Commercial Code.

**LOPERENA:** The formation of the contract under the Civil and the Commercial Codes had different systems because they belong to different times, but lately the Commercial Code conforms to the system of the Civil Code.<sup>11</sup>

**GILL:** By amendment of the Commercial Code?

**LOPERENA:** Yes. Thus, we have the same system for the formation. But the means of expressing the intent, the acceptance of the offer, are not foreseen in the Commercial Code, so in the loopholes of the Commercial Code you have to apply the Federal Civil Code.<sup>12</sup>

**GILL:** I am surprised that such a fundamental issue would be left to a supplemental law for the Commercial Code.

**LOPERENA:** Yes. Because the Commercial Code only says when the contract is completed. The Commercial Code follows the same system as the Civil Code. But how to express the intent of the parties is something that was not explicitly provided for in the Commercial Code. The Civil Code says that the acceptance of a contract, the expression of the intent of the parties, can be expressed explicitly or implicitly. The explicit consent means that you accept a contract by your unequivocal expressions. The implicit acceptance is by performance of such acts that are evidence that you accepted.

**GILL:** So acceptance may be by behavior rather than by an expression of words?

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11. CÓDIGO DE COMERCIO, art. 80.

12. *Id.* art. 2.

**LOPERENA:** Yes. The behavior of paying for merchandise, that is, the taking of the merchandise in Kansas by the Monterrey company and taking the merchandise to Monterrey is enough evidence to consider that implicitly the Mexican company accepted not only the merchandise but also the counteroffer of the Kansas company. That is why I think there is an agreement that Kansas law applies and that this application could exclude the CISG (Vienna Convention).

**SPANOGLE:** You are about three steps ahead of me. Please first tell me from where you are getting your choice of law principles? Are they in the Civil Code?

**LOPERENA:** The Federal Civil Code, yes.

**SPANOGLE:** Because I have heard of an Inter-American Convention on the Law Applicable to International Contracts.<sup>13</sup> Is Mexico a contracting party to that Convention?

**LOPERENA:** There are only two countries: Venezuela and Mexico.

**SPANOGLE:** If you are a contracting party to that Convention, then would that Convention determine the choice of law rules that you would apply to this particular case?

**LOPERENA:** In my opinion, yes.

**PEREZNIETO:** Not in front of another contracting state; it is not applicable because the United States has not ratified that convention.

**SPANOGLE:** Article 2 of that Convention says the law designated by the Convention shall be applied even if such law is that of a state that is not a party.<sup>14</sup> Does that bring in the U.S. at all?

**PEREZNIETO:** If the Mexican judge follows this direction.

**LOPERENA:** But the question is, must the Mexican judge follow this direction?

**PEREZNIETO:** In practice, a Mexican judge will look to the Civil Code for choice of law rules.

**SPANOGLE:** Okay. What is the choice of law rule in the Civil Code? What are the criteria for choosing any law other than that of Mexico?

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13. Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1944, 33 I.L.M. 732 (1994) [hereinafter Inter-American Convention].

14. *Id.* art.2

**LOPERENA:** There are several rules for applying foreign law in some cases. But first, contracts completed in Mexico are governed by Mexican law. This is the main rule in contracting law.

**SPANOGLE:** So we are back to whether acceptance is effective upon dispatch or upon receipt? That then also depends upon what is an acceptance. Is it the responsive message, or is it the taking in of the goods?

**LOPERENA:** I consider the taking of the goods, the paying of the price, and the receipt of goods in Kansas as constituting acceptance.

**BAUMAN:** Are we failing to distinguish between acceptance and performance?

**PEREZNIETO:** We are confusing the problem because we are talking about two different things. One thing that is clear is the offer and the acceptance of the offer, what we call in the Civil Code *acuerdo por correspondencia* – agreement by mail or other correspondence. It is clear in this case that the applicable law will be the Mexican law because the same code says that the perfection of the contract takes place when the offeror receives the acceptance of the offeree. At that moment the contract is perfected, and the perfection takes place in Mexico or the goods are received in Mexico. Therefore, the applicable law is Mexican. However, if the seller puts the merchandise at my disposition in Kansas, I go to Kansas, but I do not say anything and take the merchandise, then, what am I doing? I am perfecting the contract at the moment that I take the merchandise in Kansas, which means that Kansas law is applicable. These are two different manners of perfecting the contract.

**SPANOGLE:** Now that we have shown that the choice of law principle in Mexico is simplicity itself, and everyone is in agreement, how about in the United States? Where do you get a choice of law rule if you are in a U.S. court?

**BAUMAN:** I think that if you are in Kansas state court, you are probably going to get Kansas laws. I guess the first question pursuant to the hypothetical would be, was the provision contained in the acceptance/counteroffer/response binding on the Mexican purchaser? And if I understand my colleagues correctly, it would not be, because it wasn't contained in the original offer. Under U.S. law, you would look at the UCC, and again the question comes down to whether or not that inclusion materially changed the offer. And I do not know the answer to that, but if it were deemed to have materially changed the offer, then it would not be binding.

**SPANOGLE:** So from where would you get a choice of law rule?

**BAUMAN:** You might have to go and look at the UCC provisions that determine, in the absence of a choice of law provision, what law should be applied. That would have to do with the parties' intent, performance, and all of those elements that you would use to argue to the court that Kansas or Mexican law would apply, depending

on which side of the case you were on. Or you could go to the Restatement of Contracts to answer this question.<sup>15</sup>

**SPANOGLE:** Before you get to the Restatement, the UCC does have its own choice of law provision. It is § 1-105, and it has two sentences. One says: if the parties agree, and there is a reasonable relationship to the place chosen, then that choice of law provision governs. The second sentence says: if the parties did not choose, and there is “an appropriate relation” between the transaction and this state, then you use the law of this state. Which means if you are in Kansas you use the Kansas UCC. If you are in a Kansas court, the Kansas court, as Mr. Bauman says, will probably find a way to use the Kansas law, under UCC § 1-105.<sup>16</sup>

I should put in at this point that there is a revised Article 1 that has been adopted by the Uniform Commissioners, and it has replaced § 1-105 with a revised § 1-301.<sup>17</sup> The major change in substance in § 1-301 is that the requirement of an appropriate relation is dropped. There are two states that have enacted revised Article 1. Both of those states have refused to enact revised § 1-301. They have simply taken the old language from original § 1-105 and substituted it. Those two states are Texas and Virginia.<sup>18</sup> Thus, revised § 1-301 is not selling, and I would expect that that will be a continuing refrain. So, even though there is new language, do not expect the states to enact it.

One other thing, the Uniform Commissioners have adopted proposed revisions or amendments to UCC Article 2, and in doing so they have re-written § 2-207, the section that has given us all trouble forever. They have substituted for the present language, which is basically what I call a “first-shot rule” (that the offer governs the terms of the transaction), language that creates what is called a “knock-out rule.” If the parties exchange forms and the forms do not agree, then all of the disagreeing terms fall out. There is only one problem. Nobody has yet enacted the amendments to Article 2, and do not hold your breath as to whether they are going to be enacted anytime soon.

Thus, the UCC does have its own choice of law provisions, just as the Mexican commercial and civil codes do. However, as both of our speakers have said, there is also the Restatement of Law on Conflicts of Law. Is it any clearer?

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15. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1979).

16. UCC, *supra* note 2, § 1-105.

17. *Id.* § 1-301.

18. As of April 10, 2005, ten states have enacted the revised version of Article 1. However, each of these states has retained the choice of law provisions from the original § 1-105 in place of the new § 1-301. These states are Alabama, Arkansas, Delaware, Hawaii, Idaho, Minnesota, Nebraska, New Mexico, Texas, and Virginia. Keith A. Rowley, *The Often Imitated But Not Yet Duplicated, Revised Uniform Commercial Code Article 1*, at 8-10 (Apr. 11, 2005) (unpublished manuscript, available at <http://www.law.unlv.edu/faculty/rowley/RA1.041005.pdf> (last visited Apr. 12, 2005)). See also, ALA. CODE § 7-1-301; Act 856 (to be codified at ARK. CODE §§ 4-1-101 to -310), available at <http://www.arkleg.state.ar.us/ftproot/acts/2005/public/act856.pdf> (last visited Apr. 13, 2005); DEL. CODE ANN. tit. 6, § 1-301; HAW. REV. STAT. § 490:1-301; IDAHO CODE § 28-1-301; MINN. STAT. ANN. § 336.1-301; LB 570 (to be codified at NEB. REV. STAT. U.C.C. §§ 1-101 to -310) (effective Jan. 1, 2006), available at [http://www.unicam.state.ne.us/pdf/FINAL\\_LB570\\_1.pdf](http://www.unicam.state.ne.us/pdf/FINAL_LB570_1.pdf) (last visited Apr. 13, 2005); HB 834, (to be codified at N.M. STAT. ANN. §§ 55-1-101 to -310) (effective Jan. 1, 2006), available at <http://legis.state.nm.us/Sessions/05%20Regular/final/HB0834.pdf> (last visited Apr. 13, 2005); TEX. BUS. & COM. CODE ANN. § 1.301; VA. CODE § 8.1A-301. The Arkansas statute does not have an explicit effective date, so it will take effect 91 days after the end of the current legislative session. See Rowley, *supra*, at 8, n.29.

**BAUMAN:** No, I do not believe it is.

**SPANOGLE:** The Restatement has very clear directions. First, the place of contracting—we have been through that. That refers to the question: is acceptance effective upon dispatch or upon receipt? Second, the place of negotiation—perhaps some satellite 21,000 miles straight up in the air. Third, the place of performance. That is better. Where is performance of this contract?

**PEREZNIETO:** In this case, there could be two places. If the Mexican party actually goes to Kansas and picks up the goods there, that would be the place of performance because it is the place of delivery. If the contract is “C.I.F. Tampico” (“Cost, Insurance, and Freight”) and the goods will be delivered in a Tampico port, it will be Mexican law.

**SPANOGLE:** So again we have certainty itself in deciding this. What is the place of performance? Do you mean place of delivery or place of actual usage?

**PEREZNIETO:** Delivery in this case.

**SPANOGLE:** The location of the subject matter of the contract?

**PEREZNIETO:** Yes, in this case it is merchandise. If the subject of the contract were machinery, not only would delivery govern but also the place where the machinery performs. It is clearer. The subject in this case is insulation. The purpose of insulation is to insulate, and maybe it could be the place where the goods were insulated. It is not only the merchandise. I buy this pipeline with this other element to cover it during certain times, and it should perform during that time. If the merchandise is insulation in Mexico, the conclusion could be that the place of performance is where the insulation is ultimately used.

**SPANOGLE:** So we have a question as to whether this is place of delivery or place of usage, and arguments can be made for each.

**GILL:** And the problem with the Restatement Second of Conflict of Laws is that none of the five alternatives or standards is given an express priority. But the Restatement goes on to say that five alternatives are to be evaluated according to their relative performance or importance with respect to the particular issues.<sup>19</sup> Now, the issue that we are talking about is the choice of law. The place of contracting, depending upon the materiality issue, appears to me to be Mexico. However, if the place of delivery under Mexican law is what counts, that would be Kansas. So the place of contracting, let's say, is the place of delivery, which is Kansas. The place of negotiation of the contract, if the delivery is used as a standard for acceptance of the contract by the Mexicans, again is Kansas. Dr. Pereznieto has told us that it is the insulation's function that is the test of performance in Mexico. Regarding the location of the subject matter of the contract, the question arises, at what point in

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19. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 188 (1971).

time? Additionally, the domicile, residence, and nationality and place of business of the parties are important. These are Kansas and Mexico. So the value of the second restatement on conflicts is not very helpful.

**PEREZNIETO:** Well, it is helpful if the judge has these criteria. A Mexican judge will emphasize the place of contracting. In this case, we said that the perfection of the contract, if this is a contract made *in absentia*, will be Mexico. Maybe the place of negotiation is more difficult because there is no single place of negotiation. One is in Mexico and another is in Kansas. Place of performance is Mexico. That means that this article is giving two criteria to the judge.

**GILL:** I thought you said the issue is whether delivery or the usage of the insulation is the test for performance.

**SPANOGLE:** If it is delivery, it is Kansas. If it is usage, it is Mexico.

**PEREZNIETO:** Well, we have different readings of this, like the Bible.

**BAUMAN:** So, the choice of law will be decided by who files a lawsuit first.

**SPANOGLE:** Where are the parties likely to bring suit, and for what reasons? Let us have the potential plaintiffs go first. If you are representing Mexa builders, where would you file suit and why?

**PEREZNIETO:** In the United States, of course. I will change my opinion as counsel to Mexa. This is the work of the lawyer, is it not?

**SPANOGLE:** All right. So you are going to file in the United States? Where in the United States?

**PEREZNIETO:** In Kansas because that is Universal's place of business. It is not a question of the place of the performance of the contract. It is a question of product liability law. In Mexican law, product liability is only ruled in very local terms. It is a consumer's law.

**GILL:** But this is not a consumer contract.

**PEREZNIETO:** In Mexico there are no rules that I could apply for a question of product liability in terms that you apply here in the United States. Then I apply the Federal Code of Civil Procedure, which says that in this kind of case involving personal obligations the jurisdiction is the domicile of the person, which is that person who designed and manufactured the insulation. That reasoning could allow me to come to the United States and file the complaint there because the insulation was designed and manufactured in the United States.

**SPANOGLE:** Okay. So you are not going to sue in Mexico. You are going to sue here in the United States. Mr. Bauman, you had an interesting take on that.



**BAUMAN:** The question is interesting because it asks where are the parties likely to file suit, and it is not clear to me how the manufacturer in the case would bring a suit, since it is the manufacturer against whom the claims are being brought. I think if I were Mexa's attorney, I probably also would want to bring a lawsuit in the United States because of the product liability provisions of our laws.

**GILL:** Are our Mexican colleagues saying that there are no provisions under Mexican law under which the damages resulting from a hazardous or defective product sold between merchants can be assessed, and that the liability cannot be established? That was not my understanding.

**PEREZNIETO:** In Mexico, the only law that provides for product liability allows you to go to an administrative office, which is the *Procuraduría del Consumidor* (Consumer Protection Office), to claim a refund or a new product instead of the defective one. That is all that you have in matters of product liability.

**GILL:** And that is between merchants?

**PEREZNIETO:** Between everybody.

**GILL:** So the consumer laws apply in transactions between merchants?

**PEREZNIETO:** Yes.

**BAUMAN:** There are a couple of other factors that I would like to talk about in terms of why you would bring a lawsuit in this country. That is, issues of contributory negligence and discovery. I am not sure what the laws are in Mexico, but it seems to me that based upon the fact pattern in this case, you may want to bring other parties in if you can. You would be able to do that in a U.S. court. The other obvious reason that you would want to bring a lawsuit in the U.S is because of our liberal discovery provisions, which would perhaps benefit the Mexican purchaser in this case. The one thing that I see that makes me hesitate is that under the fact pattern in this case it seems to me that you are going to have experts talking about what the standards in the industry are with respect to the metallurgy—the composition of the pipe that caused the problem to arise in the first place. And we know from the fact pattern that the Mexican Government mandated the composition of the pipes that were used by the Mexican refinery. We also know that this same type of pipe is not used in the United States. So to the extent that standards become an issue, you might want to bring this case in Mexico because you would want the Mexican standards to apply in terms of what is reasonable and what is normal usage in the trade, as opposed to bringing the case in the United States where the other side is going to be able to argue that the pipes in Mexico are somehow not up to the standards that are customary.

**PEREZNIETO:** As far as I know, when we are talking about international industries, such as petroleum, most of the goods that are in this industry are considered commodities, and the pipe and the insulation should be standardized all over the world. If I am buying this kind of product, I know what conditions this

product has and how I should use it in ordinary or normal conditions. If I do not use it in normal conditions, I cannot file a claim under Mexican law because I am at fault. Based on the Mexican Federal Civil Code, we have the principle of *nemo tenetur*, which means that I cannot file a claim when it was my fault.

**SPANOGLE:** All right. You have answered the easy one: Where would you sue if you are representing Mexa?

Suppose instead we give you a new client, Universal. If you are Universal, do you just sit by and wait for the guillotine to fall, or is there anything that you can do by way of going to court and initiating an action yourself? And, if so, where would you do it?

**BAUMAN:** The only way that I see that Universal might be able to bring a lawsuit is a declaratory judgment action, and the one hook that I see in this fact pattern is the insurance issue. To the extent that there is a coverage issue, you are going to have an insurance company who in all probability will file a declaratory judgment action to determine coverage against the insured. This raises an interesting issue. If Universal is sued by its insurance company under a declaratory judgment action over the issue of whether or not there is coverage, which has to do with whether this is a defective good or whether it is simply an unsuitable good, then that gives Universal an opportunity to counterclaim against Mexa and bring them into that declaratory judgment action. But that is the only way that I see an ability by Universal, in a circuitous way, to use an existing lawsuit to bring Mexa in as an additional party.

**GILL:** Are you saying that it would be useful for the insurance carrier to bring the declaratory action in order to establish its non-liability because the goods were not defective goods, but simply unsuitable for the performance or the functions under this particular contract in this foreign nation?

**BAUMAN:** Right. And I am not an insurance expert, but my understanding of your typical business liability coverage is that if there is a claim for a defect then there is coverage, because that constitutes negligence. But if it is unsuitable, then there may not be coverage. Or maybe it is the other way around. But the point is, if there is an issue with respect to coverage, it is more likely than not that the insurance company is going to file a declaratory judgment action to have a court determine that issue, because an insurance company is not going to run the risk of denying coverage and then being sued at a later time for failing to provide that coverage. So it is in the insurance company's best interest to file for a declaratory judgment to have that issue decided by a court.

**GILL:** And to bring in the Mexican company and the U.S. company?

**BAUMAN:** No. They would just file a declaratory judgment action against their insured, which would be Universal. But that might give Universal an opportunity to bring a counterclaim and bring Mexa in as a third party to the lawsuit, claiming that in the absence of Mexa, there are issues that could not be resolved adequately.

**SPANOGLE:** Now, if you are going to persuade the insurance company to bring this suit, where would you like them to bring it?

**BAUMAN:** Probably in Kansas. I think that if you could get this issue decided by a Kansas jury, as a litigator you might consider that the sympathies of a jury in Kansas would be on your side.

**SPANOGLE:** But the law is dead set against you, because they are going to apply the UCC, which means that, under § 2-207(2), your disclaimer does not get in.<sup>20</sup> It does not have a prayer. So is that what you really want to do?

**BAUMAN:** What is the alternative?

**SPANOGLE:** Well, I do not know. According to Lic. Loperena, Mexico might apply the last-shot doctrine and might say that the counteroffer survives, and then Mexico sets the terms when Mexa accepts the goods. Can we get Mexican law to apply?

**BAUMAN:** I do not think you have a prayer.

**SPANOGLE:** Well, note that under UCC § 1-105,<sup>21</sup> if you go to Kansas, the court is going to apply the UCC. But if you go to New York or Boston, there may not be an “appropriate relationship.” Then you are back to using the Restatement. We all know that that does not make any sense at all, but you just might get a New York or a Massachusetts court to apply Mexican law on the basis, as Dr. Perezniето said, that that is where the goods are actually being used, and that usage is what caused the problem. Thus, you might want to think about almost anywhere in the world but Kansas as a place to bring this declaratory judgment action because you do not want the UCC to apply if you can avoid it. And it is very difficult to persuade a court to apply Mexican law. And even if you do, Universal does not want Dr. Perezniето as its expert witness.

**PEREZNIETO:** If I were the representative of Universal, my strategy would be for Mexican law to be applied, because then I shift all the problems from product liability to another question. If I do not win this case, the indemnification from Mexican courts will be much lower than the U.S. courts.

**SPANOGLE:** All right. We are past the halfway point, so we ought to get to the other half of this question. Sixteen years ago there was a treaty that came into effect called the Convention on Contracts for the International Sale of Goods, known sometimes as CISG or the Vienna Convention. Let us analyze exactly the same facts, but this time with the CISG in mind. The first question is the following. Do we need to decide whether Kansas or Mexican law applies? Do we need to go

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20. UCC, *supra* note 2, § 2-207, para. 2.

21. *Id.* § 1-105.

through choice of law doctrines in order to try and decide this case, once we say that CISG is present?

**PEREZNIETO:** In my opinion, we do not have to decide which law applies to the formation of the contract. In Mexico, we call the CISG the Vienna Convention. The Vienna Convention applies to the formation of the contract, and the conflict is not difficult.

**SPANOGLE:** Under what circumstances does CISG apply to a transaction? What do you have to show?

**PEREZNIETO:** First that it is an international contract and the parties have their main place of business within the territory of the contracting state.

**GILL:** And both Mexico and the United States are contracting parties to the CISG.

**SPANOGLE:** If you look at Article 1 of the Convention, it says it applies to contracts for the sale of goods.<sup>22</sup> It does not define “contract”; it does not define “sale”; it says very little in the way of defining “goods.” But there must also be an international sale of goods, and it does define “international” in a fairly spectacular way. How do I know whether this is an international sale of goods under the Convention? What do you have to show?

**PEREZNIETO:** What you have to show is that the parties have their principal establishment in different countries, countries party to the Convention, or if one of the parties is not a party to the Convention, that the choice of law rules for that country which is party to the Convention are the same as those of the non-party state.

**SPANOGLE:** Three steps at least, only two of which are being used in the United States. The first thing you have to show is that it is an international sale of goods. You are interested in where the parties are. You are not interested in where the goods are. You are not even interested in whether the goods are moving from one jurisdiction to another. The goods can absolutely remain motionless in a warehouse, and the Convention will still apply. This will still be an international sale of goods as long as the parties are in different countries.

How do we tell where a party is? How do we tell where a party is located, or what aspect of a party has to be located in order for it to count under the Convention?

**PEREZNIETO:** The place of business determines this. It is not the location physically in a given moment between parties whose places of business are in different states. So if Universal’s place of business is in the United States, in Kansas, and Mexa is in Monterrey, we have two different places of business in two different countries.

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22. CISG, *supra* note 4, art. 1.

**SPANOGLE:** In the preamble to Article 1, Paragraph 1, it says that the parties have to have places of business in different states.<sup>23</sup> Then in Article 1, Paragraph 1(a), what does it say about those states?

**PEREZNIETO:** The states must be contracting states.<sup>24</sup>

**SPANOGLE:** So, to qualify under 1(a), you have to have not only parties in two different states, but also each of those states must be a contracting state. The U.S. and Mexico are both contracting states. Suppose this was a transaction between Mexico and England. England is not a contracting state, and probably never will be. They like their sales law as drafted in the 19th Century, and they do not want any of this more modern stuff. Then what do you do? Is it impossible for CISG to apply to a Mexico-England transaction?

**PEREZNIETO:** No, it is not impossible if after applying the rules of choice of law, it appears that a contracting state law is to be applied.

**SPANOGLE:** That is Article 1, paragraph 1(b).<sup>25</sup> So note that there are two ways to get CISG to apply, and that (a) and (b) are joined by the word “or,” which means you can use either of them.

**GILL:** Except with respect to a state like the United States, which has taken the reservation under Article 95 to exclude application of Article 1, Paragraph 1(b).<sup>26</sup>

**SPANOGLE:** All right. So we have a U.S.-England transaction, and choice of law principles indicate that the law of the United States should apply. What law governs that contract?

**GILL:** As far as U.S. courts are concerned, it is pretty clear that the law of the United States will apply, and in this case that would be Kansas law.

**SPANOGLE:** So that would be the UCC and not the CISG (Vienna Convention)?

**GILL:** Although the CISG is arguably part of the law of Kansas because it is the federal law applicable throughout the United States, that would not include the applicability of the Vienna Convention, where in fact the parties include a party such as England, which is not a contracting party of the Vienna Convention.

**SPANOGLE:** Okay. So at least in a Mexico-U.S. transaction, the CISG is going to apply.

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23. *Id.*, para. 1.

24. *Id.*

25. *Id.* para. 1(b).

26. *Id.*, art. 95 (“Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.”).

**BAUMAN:** Except in our fact pattern, there may be an argument that the CISG should not apply because if Kansas has a law like we do in the State of New Mexico—which says that if the commodity being sold is going to be incorporated in realty, then it is not a good and not covered by the UCC or the Unfair Trade Practices Act, or any other act that defines goods—you could argue that this is not a good, and so it is not covered by the CISG.

**GILL:** That is a very eccentric provision in the New Mexico law.

**BAUMAN:** I do not think it is. Even the UCC states that if the good becomes part of realty or is incorporated into realty, then it is not a good covered by the UCC.

**SPANOGLE:** Well, it depends upon which article of the UCC you are talking about. Article 9 goes along with that, but does Article 2?<sup>27</sup> Under Article 2, goods are anything that is mobile at the time of sale, not at some later time when they may be incorporated into real estate.

**GILL:** And both Dr. Pereznieta and Lic. Loperena, I believe, have agreed that the performance of this agreement may have been based upon the delivery of the product in Kansas to the shipper selected, presumably, by the Mexican party, F.O.B.

**SPANOGLE:** But you can opt out of the CISG. Under Article 6 you can say, I do not want the Vienna Convention to apply.<sup>28</sup> Have the parties said that in this case?

**BAUMAN:** The parties do make reference to the UCC. So if you wanted to avoid application of the CISG, I think that is where you would argue that because the counteroffer does make reference to the Kansas Uniform Commercial Code, then the CISG does not apply. I think that failing that argument, you are probably going to be stuck if the Kansas court applies the law as it should.

**SPANOGLE:** By the way, I am Universal's attorney, and I have heard of this CISG, or Vienna Convention. I do not understand it; I have not read it. I am a busy attorney, but I have heard that I can get out of it. Should I just write into all my form contracts that this CISG, whatever it is, does not apply?

**GILL:** I have observed, Prof. Spanogle, that you or one of your colleagues has suggested that it would be a matter of malpractice for a U.S. attorney to fail to consider whether or not application of the Vienna Convention would be favorable to his client, if the attorney is asked to advise the client upon drafting the contract.

**BAUMAN:** I think it depends on your motivation. Based upon the scenario that you painted, the lawyer is simply opting out because of laziness, as opposed to really

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27. UCC, *supra* note 2, §§ 2-105, 9-102, para. 44 (Article 2 relates to sales while Article 9 relates to secured transactions.)<sup>2</sup>

28. CISG, *supra* note 4, art. 6 (“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.”).

protecting the client. If that is the motivation, then possibly that would constitute malpractice.

**PEREZNIETO:** Is the attorney protecting the client or protecting the unfulfillment of the client? Sometimes the Vienna Convention provisions are more favorable to the party who is complying with the contract but less favorable to the party that is not fulfilling or performing the contract properly.

**GILL:** There has been some commentary suggesting that generally the convention on the international sale of goods tends to be more favorable to the buyer. I would be interested in the comments of Prof. Spanogle on that one.

**SPANOGLE:** I would think that it is actually more favorable to the seller than to the buyer simply because the ability to reject the goods for anything less than a perfect tender under UCC § 2-601<sup>29</sup> is not available under the CISG. Therefore, substantial performance is rewarded with substantial payment, whereas under the UCC substantial performance is often rewarded with no payment at all. It seems to me that sellers might think that that was a good deal, especially if the alternative was to have the goods rotting on the quay in the port of Malawi. But, the next question has to be, what would result under the Vienna Convention? How would an American court decide this case under the CISG?

**GILL:** I think the federal courts of the United States would find that under the circumstances there was a contract that was governed by the CISG.

**SPANOGLE:** How would they treat the response? Would they treat that as an acceptance or as a counteroffer under Articles 18 and 19?<sup>30</sup>

**BAUMAN:** Because the counteroffer materially changes the terms of the offer, in particular the waiver or attempted waiver of the warranty, it would not be treated as a binding acceptance.

**SPANOGLE:** So, do you have a contract after the goods have been shipped and received and paid for and used? Or was this a donation?

**BAUMAN:** I think there are several questions. Is there a contract? I think there is a contract. The question is, what is the contract comprised of? The CISG would not provide that the contract included the waiver of warranty or the choice of law provision. So the question is, absent those waivers, is there still a contract?

**SPANOGLE:** Could I ask you to back up just a step or two? How is the contract formed? You have an offer, then a counteroffer, and under CISG Article 17 the counteroffer rejects and terminates the original offer. The goods are shipped, and

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29. UCC, *supra* note 2, § 2-601 (“Buyer’s rights on improper delivery”).

30. CISG, *supra* note 4, arts. 18, 19.

they are accepted. How is the contract formed? The CISG usually speaks in terms of an offer and an acceptance. How do you get an acceptance here?

**BAUMAN:** The acceptance is in the shipping of the goods, the acceptance of the goods, and the payment for the goods.

**SPANOGLE:** Okay. If the contract is formed by acceptance of the goods, what is the offer? Is the offer the counteroffer that was sent out, or is the offer the nondenominational shipment of the goods?

**BAUMAN:** Nondenominational?

**SPANOGLE:** The shipment of the goods does not necessarily have terms associated with it, but the counteroffer certainly does. So if the acceptance of the goods is the acceptance of the contract, is that an acceptance of the counteroffer's terms?

**BAUMAN:** No.

**SPANOGLE:** Why not?

**BAUMAN:** Because under the CISG, to the extent that the counteroffer had additional terms that materially changed the offer, then the whole thing is out the door.

**GILL:** The so-called counteroffer has become the controlling offer that was accepted by the Mexican party by acceptance of the goods and payment for them. So the terms of the so-called counteroffer, that is to say the responsive offer, in fact control the terms of the agreement among the parties, which includes the exclusion of the implied warranties.

**BAUMAN:** I do not think that you can get there under the CISG because of the fact that the counteroffer was never binding on the Mexican purchaser because it contained additional terms that materially altered the original offer.

**SPANOGLE:** Is there any rejection of the counteroffer?

**BAUMAN:** Does there have to be?

**SPANOGLE:** Does an offer continue until it is terminated? It could lapse, but there does not seem to be a termination.

It would clearly terminate if the original offeror wrote back and said, "Your terms are lousy. Do not ship." Or even if they wrote back and said, "I do not agree to the terms." But until then, the offer still seems to stand, does it not? The old "last-shot" principle?

**BAUMAN:** Not under the CISG as I understand it.



**SPANOGLE:** Let me turn to the Mexican delegation. How would a Mexican court interpret these facts under the CISG?

**LOPERENA:** First, we have to take care of the lack of conformity of the goods that have been sold under the rules of the Convention. I am looking at Article 35,<sup>31</sup> Article 38,<sup>32</sup> and Article 39.<sup>33</sup> First of all, there is no obligation of the buyer to examine the goods. The CISG says that after delivery the buyer must examine the goods unless they are redirected to a different location. Therefore, when the goods arrived in Monterrey, Mexico, the buyer should have examined the goods and made all necessary tests to see if the goods conform for the insulation of the pipeline that is used in Monterrey. The CISG mandates that the buyer take care of that. If the buyer just used the insulation without duly examining it, then maybe there is negligence on the part of the buyer. Therefore, since the buyer did not examine the merchandise and did not notify the seller of the nonconformity of the insulation and negligently installed insulation on the pipelines, I think the buyer is to be considered guilty if there is any lack of conformity of the goods.

**SPANOGLE:** Note a couple of things here. One is that Mr. Bauman has a very good point in that, although Articles 18 and 19 look as though they are imposing the “last-shot” doctrine, the courts that have had to consider this have all rebelled. In the materials, DiMatteo and Nakata report the two most famous cases under the CISG.<sup>34</sup> One is the *Chilewich* case in the U.S.<sup>35</sup> where the parties exchanged forms that never agreed, and the Court bent about seven different contractual doctrines into unrecognizable shape to find that there was a contract, including saying that silence between parties who had never had a deal before would be considered acceptance. DiMatteo reports a German case in which there was a condition that would normally be thought of as a material addition.<sup>36</sup> The German Court said it was not material. So in the reported cases, the courts are trying to find a way to say we will not impose 19th Century law in the 21st Century. We will do anything we can to avoid that.

The other question is whether under the CISG this is an effective disclaimer of obligations. Note that there are no warranties under the CISG. The word “warranty” is deliberately never used because “warranty” means too many different things in too many different countries.

**GILL:** However, Article 35, paragraph 2 of the CISG does say: “Except where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purpose for which goods of the same description would ordinarily

31. CISG, *supra* note 4, art. 35.

32. *Id.*, art. 38.

33. *Id.*, art. 39.

34. Larry A. Dimatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 Yale J. Int'l L. 111 (1997); Gary Kenji Nakata, *Filanto S.p.A. v. Chilewich Int'l Corp.: Sounds of Silence Bellow Forth Under the CISG's International Battle of the Forms*, 7 Transnat'l Law. 141 (1994).

35. *Filanto, S.p.A. v. Chilewich International Corp.*, 789 F.Supp. 1229 (S.D.N.Y. 1992) [hereinafter *Chilewich*].

36. Dimatteo, *supra* note 34.

be used,” and it goes on to say, “are fit for any particular purpose expressly or impliedly made known.”<sup>37</sup> Now, why are those not the equivalent of what we have regarded as implied warranties under the UCC?

**SPANOGLE:** Oh, they are the equivalent. The question is, how, if at all, can you get rid of them?

**GILL:** Well, Article 35 goes on to say, in Subsection 3: “The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”<sup>38</sup> That raises some difficult questions of interpretation, but the seller did use the term “as is” or “with such faults as the goods may have,” and the buyer knew this either at the time that the insulation was delivered F.O.B. or at the time that the insulation was installed in the refinery in Mexico. So the question, it seems to me, then becomes whether the language of the seller is effective under these circumstances because it says “aware of the lack of conformity.” In fact, the buyer, the Mexican company, did not become aware of the lack of conformity until after the insulation was installed on the refinery pipelines.

**SPANOGLE:** You may have a problem using Article 35, paragraph 3. If I wanted to get rid of these obligations, I would look at Article 6 instead.

**LOPERENA:** I am looking at Article 35, paragraph 2(a). “The goods do not conform to the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used.” I would ask, what is the reference point for “ordinary use”? Ordinarily where? Mexico? Canada? The United States?

**GILL:** And under our fact pattern, the goods performed adequately throughout the world except in Mexico.

**SPANOGLE:** Note that Article 6 says you can exclude, not just the whole Convention, but also any part of it. So, I could exclude Article 35.

**GILL:** But does the kind of acceptance that we are talking about—acceptance of delivery or installation of the insulation—constitute an agreement to a derogation from the contract? I think the courts would find that very difficult to accept.

**SPANOGLE:** Then how would you write it? You have become Universal’s attorney. How would you write this same language? What language would you use to accomplish the same purpose under the CISG?

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37. CISG, *supra* note 4, art. 35, para. 2 (“Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purpose 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 where the circumstance show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment . . .”).

38. *Id.*, para. 3.

**GILL:** I would be almost reduced to advising my client, Universal, that they had better get an acceptance of the terms “as is” or “with such defects” from the purchaser before they delivered the product.

**SPANOGLE:** I understand that, but would you use “as is” as your operative language under Article 6?

**GILL:** I would prefer to use more explicit language, which also is elsewhere suggested in the Uniform Commercial Code, to expressly state that there are no warranties with respect to the product, express or implied, that accompany the sale of the product.

**SPANOGLE:** That is fine. If I am Mexa, I simply say I do not want any warranties. But I will rely on the obligations that are created by Article 35. And the language you just gave me did not disturb the obligations under Article 35. They are not warranties. They are obligations. So, if you are drafting a disclaimer, what would you say?

**GILL:** We disclaim the application of Article 35 of the CISG.

**SPANOGLE:** I think that is a far better approach to this and you want to call them obligations of quality.

**GILL:** Are there U.S. cases that have in fact construed Article 35 as not constituting the equivalent of implied warranties, as that term is used in the UCC?

**SPANOGLE:** Not that I am aware of.

**LOPERENA:** In Mexico, there is a usual provision in contracts that says that the buyer has examined or has made somebody examine the goods to be acquired—that the goods have been examined by an expert and that they conform to the specifications and quality, quantity and so forth that has been agreed upon in the contract.

**GILL:** I think that was possibly a very profitable procedure for Universal to protect itself, to somehow arrange for the inspection of the goods by a party designated by the purchaser.

**LOPERENA:** But I think that what is fair is to not only write a provision, but to practice what that provision says. If you are sending something, please send me somebody to make an inspection of the goods to be sold or the goods already sold before delivery. Then, sign a document where they attest that they have reviewed and inspected the goods, and that they conform to the specifications requested by the purchaser.

**SPANOGLE:** Will that protect you against latent defects?

**PEREZNIETO:** Well, if you review the goods, and they seem okay, in good condition, and later on there is a defect . . . .

**GILL:** To what extent have Mexican administrative bodies or courts applied the standards requirements that have, in my understanding, been so elaborately developed in Mexico for a number of products? This is a question for our Mexican colleagues. This would be, I assume, an administrative question in Mexico. There is an administrative body in Mexico that has been designated within the Secretary of the Economy's office to establish standards over products, right? The official norms?

**LOPERENA:** NOM for *Normas Oficiales Mexicanas* (Official Mexican Norms).

**GILL:** Yes. And my question is a general one about how the norms established by Mexican administrative bodies are applied, and would they under any conceivable circumstances be applied to the kind of insulation that is the subject of our hypothetical question?

**LOPERENA:** First, I do not know if there is an NOM about insulation. And if there is, I do not think the Secretary of the Economy would closely supervise the quality of these products. They do not have a fixed standard or ordinary supervision on all production. It would be impossible.

**SPANOGLE:** If I am a transactions lawyer, my clients want me to make sure that they do not have to litigate and that they do not have these kinds of problems. You are counsel for Universal, and Universal has been selling in the United States, but they have suddenly decided that what they would really like to do is to sell to Mexico and Saudi Arabia and all sorts of places and increase their business. You think that is probably a pretty good idea, but your client comes to you and says, "Counsel, I had a horrible dream last night. I dreamt that I sold my product to Mexico, and the refinery fell down. Counsel, do your magic. Go to my sales department and tell them how they can avoid having this problem." What will you tell them to do?

**LOPERENA:** You have to draft the contract very carefully, taking care of all this stuff, giving all the specifications of the insulation to be sold, telling the purchaser what is proper for which kind of uses and all the proper warnings. I think American lawyers are experts in that. I have read jokes about such warnings that American lawyers have told me were not jokes, but were real warnings on the packaging of many things. One container that had peanuts said: "Warning: contains nuts." Or, a warning on the bottom of a package that says, "Please do not turn over." Too late. When you read it, you already did it. If you are not selling to the final consumer but to industrial companies, you may have all the specifications and all the clauses in the contract regarding use of the product, review, inspection and conformity with the product to avoid all this stuff, and of course, fixing the contract in accordance with the CISG and looking for a way to fulfill all the obligations of Article 35.

**SPANOGLE:** So you draft this wonderful 120-page contract.

**LOPERENA:** It could be shorter.

**SPANOGLE:** All right, a ten-page contract. And you send it to the potential buyer after they have sent you an order, and you get no response at all. Do you send the goods? Do you have a contract?

**LOPERENA:** No. If I send the contract to be signed, and they do not answer, I should not send the goods because I am taking the risk that they say, "All right, I have the goods here, and I do not have to pay for them unless they sign a different document." First you have to agree on a contract, and then you have to deliver. I know that the sales department's responsibility is selling and selling, and they do not care about attorneys' opinions. They consider us troublemakers. But you have to exercise your authority and tell the owner of the factory, "You want more nightmares? Allow them to sell this way. You do not want nightmares? Okay, do not sell anything."

**PEREZNIETO:** What I could do, Lic. Loperena, is to add a clause saying that if I do not have a response in five days of this contract, I will understand that it is accepted, and the contract is concluded, because my merchandise is on the way to you. And then if you receive my merchandise, you accept the contract on the terms.

**LOPERENA:** Yes. The contract can be included in the receipt of the goods. If I receive payment, it is a means of conformity with the following clauses, and when they receive the goods, they can also accept all these conditions.

**PEREZNIETO:** And because we will be under a letter of credit, there will not be a problem.

**SPANOGLE:** This did not have a letter of credit with it.

**PEREZNIETO:** How would you pay it?

**SPANOGLE:** Open account, just like most sales are. Wire transfer. But, I am entranced by the idea that you can set down something that says no response means you agree to my terms. Silence is acceptance?

**LOPERENA:** Payment is acceptance. According to Mexican law and according to the Vienna Convention.

**SPANOGLE:** You send off your 10-page contract and by fax you get back the order form of the buyer. What do you do?

**LOPERENA:** Well, it is best not to leave the decision to the sales people, but the legal department has to intervene to ensure that the goods are not delivered until they sign a document accepting our conditions.

**SPANOGLE:** So you have just killed the international initiative of your client.

**LOPERENA:** Initiative to get into trouble.

**SPANOGLE:** Is there any risk that you are creating by your approach? In other words, is there a risk of overkill in that you have just deprived your client of a potentially profitable market that they might otherwise get into?

**LOPERENA:** It is a matter of competitors. How many competitors the client might have. It is a business decision, not a legal decision. The best solution from the legal point of view is to have a contract well drafted and signed by the parties. But if you think that with this contract you are going to lose your customers, you have to make a decision to get better insurance.

**PEREZNIETO:** Take the risk.

**SPANOGLE:** Can you get that kind of contract merely by sending out forms? And if not, what can you do if you are Universal's attorney to get these kinds of contracts that you are talking about?

**PEREZNIETO:** To have a document with all these conditions signed by the person receiving the merchandise.

**SPANOGLE:** How do you get them to sign? Merely putting it in the mail? Even FedEx does not ensure that you will obtain a signed contract.

**LOPERENA:** Somebody has to come to Kansas.

**SPANOGLE:** So in order for Mexa to get the privilege of buying your stuff, Mexa has to send somebody, physically, to Kansas. Long-distance communication is not that difficult. But you are saying that somebody must physically fly up from Monterrey to Kansas. That is a little unlikely.

**PEREZNIETO:** I think that, as Lic. Loperena said, a clause saying in this large contract that payment is acceptance, and another clause saying "I do not ship my merchandise unless you pay."

**SPANOGLE:** And buyer in Monterrey promptly sends back a one-page order acknowledgment that says: "Shipment is acceptance of our terms." Now we have reached an impasse. We have not solved the problem. All you have done is kill a market. Surely transactions attorneys can do better than that.

**GILL:** One alternative that is generally used today that does not avoid the development of disputes but provides a method of resolving disputes is international arbitration. That does not solve in any way the issue that you proposed a moment ago, but it is the customary way of anticipating a reasonable way for resolving disputes.

**SPANOGLE:** Ten years ago you could just put in an arbitration clause in the Universal response, knowing that the Mexican side would not want arbitration and

would say, no, use litigation. That day has passed and now both parties can agree on arbitration, but they have not agreed on whether there is a disclaimer or not.

If Mexa does send somebody up to Kansas, what are you going to tell them? Are you going to tell them: We sell all our goods as is?

**PEREZNIETO:** Do not come by yourself. Come with an expert.

**SPANOGLE:** You want us to send the whole company on a vacation to Kansas? They would rather go to Cancun, thank you just the same.

**PEREZNIETO:** You have to send a sample to be inspected by them and then somebody to accept the goods as they are.

**SPANOGLE:** But you still want that “as is” in the contract. Right? So before the sale, you want the sales department to tell the potential buyer, “We do not stand behind our goods?” I take it that the sales department would be a little bent out of shape on that. They are actually proud of their goods. Is there something else that you would like to communicate rather than “as is” or “we do not stand behind our goods”?

**LOPERENA:** It depends on the market. Again, it is a business decision more than a legal decision.

**PEREZNIETO:** We are pointing out everything at the moment of the contract and delivery, but these kinds of sales are not sales that are made from one day to the next. In these kinds of sales, the seller usually sends the general conditions of the product. Those general conditions are accepted or not accepted by the buyer. At the beginning, if the buyer accepts these general conditions, because they are the general conditions for that specific product, the exchange of papers is very quick. All that is required is half a page that says, “according to the general conditions of this product, etc.” Most of the problems that could happen will be avoided by these general conditions.

**SPANOGLE:** Well, that eludes the question ever so slightly. What would you put in those general conditions? Would you put in your general conditions “as is”? Meaning, “we do not stand behind our goods.”

**PEREZNIETO:** I did not understand the question.

**SPANOGLE:** Well, you are saying that Universal should set up general conditions. And in civil law countries, general conditions are normally set up and agreed to by parties, but they may be negotiated between two different industries. In America, the equivalent is to set up a form contract with lots of boilerplate in it, usually drafted by one party. If you are going to use the general conditions approach, what do you say in the general conditions? Do you say “as is”? Do you say, “We disclaim all obligations of quality”? Which, whether you intended it that way or not, to the buyer it means you do not stand behind your goods. That is, we think our goods are junk. Is that what you want to put in your general conditions? If not, what do you want to

put in your general conditions that protects your client but still represents that you really think the product is pretty good?

**PEREZNIETO:** The standard conditions, which include the quality of the goods, the way they should be installed, and the method of delivery.

**BAUMAN:** Would the seller be able to protect itself by including in its response a statement that it is not responsible for any non-conforming goods, that it is not responsible for any non-suitability of goods, and that these terms are accepted upon either payment or taking delivery of the products? At that point, you have eliminated the lack of conformity and the lack of suitability—at least you have stated that it is denied—and you have said that they accept your terms, since under the Convention, the response is what becomes the counteroffer, and you have stipulated that if they do not sign it but they accept the goods or if they pay for it, then they have accepted your terms.

**SPANOGLE:** When do you plan to send this to the buyer?

**BAUMAN:** The buyer would send a purchase order, then the seller would respond with its terms.

**SPANOGLE:** And what do you do when you get back a one-page fax from the buyer that says, “Our terms are that you guarantee everything, and shipping the goods is acceptance of our terms”?

**BAUMAN:** You send another response.

**SPANOGLE:** That is a very good way to kill a whole forest. We can actually program fax machines so that, every time they get a fax from a certain telephone number, or a certain range of telephone numbers, they send back a response instantaneously, and without being touched by human hands.

**BAUMAN:** With a sales force trained to do this in response to changes, you would not have to do that.

**SPANOGLE:** You are trying to win the battle of the forms. I remain somewhat skeptical of your ability to do that, given modern ability to program fax machines. And especially the use of “my way or the highway” clauses, which say I ship or accept only on my terms. I am skeptical as to whether you can win the battle of the forms against a well advised adversary. And I am just trying to find out if there is some non-adversarial approach that might save the day and allow the transaction to go ahead.

**JOHN ROGERS:** With the benefit of hindsight you might say something like the following: “This insulation has been used with the following type of pipe. If you expect to use some different type of pipe, we recommend that you test it with that pipe before installing it.” That does not have anything to do with the battle of the



forms, but it might be a constructive suggestion that might prevent the problem from ever arising.

**SPANOGLE:** Where would you put this?

**ROGERS:** In your counteroffer.

**BAUMAN:** How about in your sales material?

**ROGERS:** Tie it to the counteroffer. By cross-reference.

**BAUMAN:** One of the problems is that this hypothetical contains this provision “as is, with all faults,” which is a provision that you normally see when you are buying a used car. It is not the kind of provision that you normally see a manufacturer put on a product that it is selling because, quite frankly, it is going to kill sales. As a manufacturer, you want to have some reasonable limitation to your exposure but at the same time stand behind the product. That is probably the resolution to this problem. Rather than taking the inflexible position that either you accept this offer with all its deficiencies or you do not take it at all, which is a deal-breaker, you compromise. Provide sufficient information so that the buyer has some idea that the product is fit for its intended use, but at the same time limit it to a particular time frame so that claims beyond so many years are being excluded from the warranty. It seems to me that that is the resolution.

**SPANOGLE:** I think we are making some progress.

**PABLO RIÓN:** I had a customer that does the electromechanical part of thermoelectric plants that are very expensive and very complicated. Things failed when they put up a thermoelectric plant, where you can blow up a whole turbine. General Electric turbines cost millions of dollars. What they did was assign a task force to put up the plant. My customer contracted to do a \$30 million portion of a job that totaled \$400 million. My customer said the people from Westinghouse have to be there, we have to be there, the Italians have to be there, the engineers have to be there, the CPSFA has to be there, and then we must form a task force and do the job collectively. I do not know how that can be written in the contract, but it is a way of sharing responsibility, saying we all have to check it out, rather than saying, who was wrong? Rather than doing that, you have a task force, they work together, and they sign a lot of things saying what they did and who was there. Everybody signs their recommendations. I do not know who would be liable if the plant blew up under this shared-responsibility scenario. The judge would have to decide.

**SPANOGLE:** Note there is an interesting difference between the contract just described and the one in the hypothetical. If we are talking about selling a GE turbine, that is enough money that we can send people to places and have them stay there for a while and work with each other. Try doing that on every \$10,000 contract, and the profit has just disappeared out of the deal. So, note that what the transactions lawyer has to do, is to figure out how we can take the kinds of concepts just presented and understand them so that they can be done simply and

inexpensively so as not to take away all the profit from the \$10,000 deal. The idea of putting the description of the goods into the sales literature, rather than putting it into a counteroffer, is a good idea. There are lots of other good ideas. As any good professor, I am going to leave some questions unanswered and up in the air. Thank you all for your attention.

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