

January 2021

## A Pragmatic Strategy for the Scope of Sales Law, the Statute of Frauds, and the Global Currency Bazaar

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### Recommended Citation

Raj Bhala, A Pragmatic Strategy for the Scope of Sales Law, the Statute of Frauds, and the Global Currency Bazaar, 72 Denv. U. L. Rev. 1 (1994).

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# A PRAGMATIC STRATEGY FOR THE SCOPE OF SALES LAW, THE STATUTE OF FRAUDS, AND THE GLOBAL CURRENCY BAZAAR

RAJ BHALA\*

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*Contract law has progressed and evolved sounder principles since the days of ritualistic and formalistic sealed instrument requirements.<sup>1</sup>*

### I. SALES LAW AND THE CURRENCY BAZAAR

The cheerful evaluation of contract law by the Court of Appeals in *V'Soske v. Barwick* is stunningly naive. At least one important branch of contract law, sales law, may be ill-equipped to serve the needs of the modern international financial marketplace. In the global currency bazaar, banks, corporations, investors, and governments buy and sell foreign currency from one another. Their transactions are conducted on tenuous legal grounds.<sup>2</sup> Fundamental issues of the scope of sales law and the enforceability of contracts are unresolved.

Perhaps if the currency bazaar were economically insignificant it would not matter whether sales law served the needs of foreign exchange traders. This bazaar, however, is the world's largest financial market. At the end of an average day, roughly \$1 trillion worth of currencies has changed hands.<sup>3</sup> This figure represents a 35 percent increase in turnover in just three years (1989-92).<sup>4</sup> Hence, explosive growth, as well as enormous size, is a salient feature of the bazaar. Moreover, the currency bazaar never closes.<sup>5</sup> At any time of the day or night millions of U.S. dollars are

1. *V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1968), *cert. denied*, 394 U.S. 921 (1969).

2. For an overview of foreign exchange transactions, see Raj Bhala, *Risk Trade-offs in the Foreign Exchange Spot, Forward and Derivative Markets*, 1 THE FINANCIER 34 (1994); ROGER M. KUBARYCH, *FOREIGN EXCHANGE MARKETS IN THE UNITED STATES* (rev'd. ed. 1983).

3. MONETARY & ECONOMIC DEP'T, BANK FOR INT'L SETTLEMENTS (BASLE, SWITZERLAND), *CENTRAL BANK SURVEY OF FOREIGN EXCHANGE MARKET ACTIVITY IN APRIL 1992* 1, 5-6 (1993) [hereinafter, *CENTRAL BANK SURVEY*]. In April 1992, the total reported gross turnover in spot, forward, and derivative foreign exchange contracts was \$1.354 trillion. (After correcting for double counting and estimated reporting gaps, the figure was \$880 billion.) *Id.* at 6 tbl. I; see also James Blitz, *All Change in Foreign Exchanges: The Nature of the International Currency Dealing Has Altered*, FIN. TIMES (London), Apr. 2, 1993, at 17.

4. *CENTRAL BANK SURVEY*, *supra* note 3, at 6 tbl. I.

5. See Scott E. Pardee, *Internationalization of Financial Markets*, 72 ECON. REV. (Federal Reserve Bank of Kansas City, Mo.), Feb. 1987, at 3, 3 (noting that "[i]n the 1970s, foreign exchange became a 24-hour market, with the major banks dealing with each other each day through their offices in the markets in the Far East (Tokyo, Hong Kong, Singapore) the Middle East (once Beirut, now Bahrain), then Europe (London, Frankfurt, Zurich), and finally, the United States (New York for interbank trading and Chicago for futures trad-

traded for Japanese yen, millions of German marks are exchanged for French francs, millions of English pounds are sold against Swiss francs, and so forth.<sup>6</sup> The buy and sell decisions of banks, businesses, and institutional and individual investors establish exchange rates. In turn, the exchange rates critically influence the international flow of goods, services, and money. The currency bazaar is too big, growing too rapidly, and too important to the international economy to ignore.

This important bazaar, however, has been ignored by legal scholars.<sup>7</sup> Because foreign exchange trading raises fundamental contract issues, this neglect must end. A legal assessment of the needs of foreign exchange market participants is required, not only by the participants themselves, but also by judges and regulators who are trying to cope with a small but increasing number of breakdowns in foreign exchange trading.

Of course the participants expect to find currency trading profitable; otherwise they would channel their resources into a different financial market. Yet, participants can no longer dismiss the breakdowns as isolated incidents in their race for profits. Formal adjudication results from mishaps that involve high monetary stakes; but when a bank, business, or investor goes to court or to a regulatory agency over a foreign exchange deal gone sour, they get little comfort. Judges and regulators are groping. They do not know whether to apply sales law to the transactions, and if so, which sales law should be used. Judges and regulators do not know whether the transactions are enforceable. Worst of all, they do not have a conceptual framework for dealing with these issues.

This article attempts to fill the large and dangerous void in legal scholarship on foreign exchange transactions. It further seeks to provide a conceptual framework for judges and regulators that will help them resolve problems in the currency bazaar. It addresses two fundamental contractual problems that arise in the currency bazaar under Article 2 of the

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ing.)"). Technically, the trading week begins in New Zealand on Monday morning at approximately 8 a.m. and ends in New York on Friday at approximately 5 p.m. While trading volumes are thin at other times, it remains possible to find counterparties with which to enter into foreign exchange transactions.

6. The five most widely traded currencies are the dollar, mark, yen, pound, and Swiss franc. The percentage of turnover accounted for by these currencies are 82, 40, 23, 14, and 9, respectively. CENTRAL BANK SURVEY, *supra* note 3, at 9 tbl. II(a).

7. With the exception of a fifteen year-old student Note, law reviews are largely devoid of articles on commercial law problems associated with foreign exchange transactions. See Michael L. Manire, Note, *Foreign Exchange Sales and the Law of Contracts: A Case For Analogy to the Uniform Commercial Code*, 35 VAND. L. REV. 1173 (1982). This Note asserts that Article 2 should apply to foreign exchange transactions, yet provides no theoretical basis for the assertion. See *id.* at 1174, 1188, 1192, 1200, 1206, and 1209. The Note fails to account for the highly significant fact that conversations between parties negotiating and concluding foreign exchange transactions typically are tape-recorded. It incorrectly suggests that all foreign exchange transactions are confirmed in writing. See *id.* at 1186-87. As page proofs of this article were being prepared, a brief article on foreign exchange transactions and Article 2 appeared. See Stephen C. Veltri, *Should Foreign Exchange Be "Foreign" to Article Two of the Uniform Commercial Code?*, 27 CORNELL INT'L L.J. 343 (1994). This welcome addition to the literature provides an excellent review of relevant pre-U.C.C. cases. It does not advocate a particular approach, like the pragmatic strategy argued for herein, to the issue of the scope of Article 2, nor does it discuss the statute of frauds.

Uniform Commercial Code ("U.C.C."). First, should the scope of sales law cover foreign exchange? Second, should oral foreign exchange contracts be enforceable despite the statute of frauds?

This article proposes that these questions be answered using a *pragmatic strategy* which emphasizes the *needs of foreign exchange market participants* in relation to Article 2. The pragmatic strategy identifies an integral relationship between the problems of scope and enforceability in order to ensure that sales law does not impinge on the vitality and dynamism of the currency bazaar. Thus, according to this proposed strategy, the resolution of the first problem hinges critically on the outcome of the second problem.

Courts and regulators have failed to cope adequately with the problem of scope. Courts have adopted a "carelessly inclusive" approach. Regulators, most notably the Federal Reserve,<sup>8</sup> have used an "aggressively exclusive" approach. Instead, an examination of the key rules of Article 2 in the context of the currency bazaar is needed before the problem can be resolved. The statute of frauds is such a rule. How it functions in the currency bazaar is a critical indicator of whether Article 2 should govern transactions in this bazaar.

Currently, courts and regulators misguidedly adhere to what is best termed the "tangibility paradigm"—the fixation on a tangible document to satisfy the statute of frauds. The paradigm should be abandoned because it does not serve the needs of the currency bazaar. It is a strict approach to the problem of enforceability that clashes with the telephonic technology of the bazaar. It is also incongruous with the repeat-player, high-trust culture of the bazaar. Legislative amendments to, or a judicial re-interpretation of, the statute of frauds is needed. Unless these changes are made, the pragmatic strategy suggests foreign exchange transactions may be appropriately excluded from the scope of Article 2. In that event, other commercial laws, considered below, may be applicable.<sup>9</sup>

By no means is the thesis advanced herein limited to the foreign exchange market. The underlying and general theoretical question is at what point is it appropriate to codify a market or industry? The foreign exchange market is a case study of this question. Recently, Professor Raymond T. Nimmer set forth three criteria to determine when a market is ripe for codification: the area of the contract (i) achieves national scope (the nationality criterion); (ii) affects substantial commercial volume (the volume criterion), and (iii) would benefit from codification instead of common law governance (the relevance criterion).<sup>10</sup> Because the pragmatic strategy suggests that market needs must be examined, the strategy appears consistent with the relevance principle. Moreover, the foreign exchange market clearly satisfies the nationality and volume criteria. The

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8. Hereinafter, unless otherwise noted, the "Federal Reserve" refers to the Federal Reserve Bank of New York and the Board of Governors of the Federal Reserve System.

9. See *infra* notes 218-235 and accompanying text.

10. Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1367-73 (1994).

problem then becomes one of the relative weight to be given to the criteria. If two of Professor Nimmer's criteria are satisfied, is the conclusion in favor of codification inexorable? Not necessarily. The thesis herein suggests that the relevance principle may be relatively more important than other criteria. We cannot rush to include or exclude foreign exchange from Article 2 until we have determined whether the statute "works" for the market.

There are five remaining parts to this article. Part II sets up a hypothetical but highly realistic foreign exchange transaction. The hypothetical transaction raises the issues of scope and enforceability, and it is used in parts III-V to advance the thesis of this article.

Part III considers the scope issue, namely, whether foreign exchange should be a "good" within the ambit of Article 2. In part III, both the carelessly inclusive and aggressively exclusive approaches are rejected; but the pragmatic strategy, which centers on the relationship between contract enforceability rules and the needs of the currency bazaar, is advanced.

Part IV applies the pragmatic strategy to the statute of frauds issue. This part highlights the clash between a formal legal approach to the statute of frauds on the one hand, and the way transactions are negotiated and concluded in the currency bazaar on the other hand. The argument rejects the tangibility paradigm and advocates changing the statute of frauds (either legislatively or judicially) to meet the needs of the market.

Even though parts III and IV focus on the application of Article 2 to the hypothetical foreign exchange transaction, no shortage exists of other sales laws for judges to apply directly or by analogy. Accordingly, Part V extends the pragmatic strategy to three other potentially applicable sales law regimes:<sup>11</sup> first, the proposed revisions to Article 2 ("revised Article 2"), which are presently under consideration by the National Conference of Commissioners on Uniform State Laws and the American Law Institute;<sup>12</sup> second, the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), to which approximately 34 countries are Contracting States, including the U.S., China, France, Germany, Switzerland, Italy, Canada, and Australia;<sup>13</sup> and third, private contract law, specifi-

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11. The common law of contract is, of course, potentially applicable to disputes arising from foreign exchange transactions. However, there is no question of the scope of this legal regime; it purports to cover all contracts unless displaced by other law. There is not a common law statute of frauds for the sale of goods.

12. U.C.C. REVISED ARTICLE 2, pts. 1-3, 7 (Tentative Draft Dec. 21, 1993) and pts. 1-6 (Tentative Draft Sept. 10, 1993) [hereinafter, December 1993 Draft and September 1993 Draft, respectively] (on file with author) and Uniform Commercial Code Revised Article 2. Sales (Draft July 29-Aug. 5, 1994) [hereinafter, August 1994 Draft] (on file with author).

13. The United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 668 (Final act, entered into force Jan. 1, 1988) [hereinafter CISG]. Documents and summary records of the Conference appear in U.N. CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.82.V.5 (1981). The text of the Conference and reservations taken by Contracting States are reprinted in Selected International Conventions, 1994 MARTINDALE-HUBBLE INTERNATIONAL LAW DIGEST, pt. VII, at IC-29 [hereinafter MARTINDALE-HUBBLE]. The legislative history of the Senate advice and consent action is found at *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearings on Treaty Doc. 98-9 Before the Comm. on Foreign Relations,*

cally, the International Foreign Exchange Master Agreement ("IFEMA") which is a standard-form contract devised recently by banks that actively trade foreign exchange.<sup>14</sup> Part V argues that the IFEMA is unhelpful in resolving the statute of frauds problem because that contract lacks the essential quantity term. Part V further argues that it may be appropriate to extend the scope of the CISG and revised Article 2 to cover foreign exchange transactions because these regimes omit a statute of frauds provision.

Part VI synthesizes the arguments of Parts III-V and draws conclusions from the application of the pragmatic strategy to the scope and enforceability problems in the currency bazaar.

## II. THE HYPOTHETICAL SPOT TRANSACTION

*The foreign-exchange market is one of the world's slickest. It is screen-based, genuinely international and open for business 24 hours a day. There are many buyers and sellers; prices adjust rapidly and for the most part smoothly. And it is huge.*<sup>15</sup>

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*United States Senate*, 98th Cong., 2d Sess. (1984). A list of Contracting States is maintained by the Treaty Section, Office of Legal Affairs, United Nations.

Curiously, even though the U.S. is a Contracting State, no court or commentator has considered the applicability of the CISG to foreign exchange transactions directly or by analogy. See, e.g., E. Allen Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17 (1984); Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443 (1989); James E. Joseph, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107 (1984); Courtney P. Smart, Comment, *Formation of Contracts in Louisiana Under the United Nations Convention for the International Sale of Goods*, 53 LA. L. REV. 1339 (1993).

14. See FOREIGN EXCHANGE COMMITTEE, INTERNATIONAL FOREIGN EXCHANGE MASTER AGREEMENT § A (1993) [hereinafter IFEMA]. Even though the Foreign Exchange Committee first published the IFEMA in November 1993, it is already being used by foreign exchange market participants in New York, London, and Tokyo. It is not the only example of a privately-negotiated, standard-form written agreement in the global currency bazaar. In 1992, the International Swaps and Derivatives Association (ISDA) published a revised master agreement which can be tailored for use in spot foreign exchange transactions by altering the schedules to the agreement. FXNET, a London-based system for netting foreign exchange trades on a bilateral basis, has issued a Worldwide Agreement.

The IFEMA, however, appears to have the brightest prospects for widespread adoption by spot market participants. In part, the IFEMA bears the informal imprimatur of the Federal Reserve. The Foreign Exchange Committee (specifically, the Financial Market Lawyers Group) drafted the IFEMA. This Committee advises and operates under the auspices of the Federal Reserve. See FOREIGN EXCHANGE COMMITTEE, 1992 ANNUAL REPORT 5 (1993) [hereinafter FEC 1992]. In addition, the IFEMA reflects what seems to be commonly regarded as the best foreign exchange market practice. See FOREIGN EXCHANGE COMMITTEE, GUIDE TO THE 1993 INTERNATIONAL FOREIGN EXCHANGE MASTER AGREEMENT § C (1993) [hereinafter IFEMA GUIDE]; Ruth W. Ainslie, Foreign Exchange: The New Master Foreign Exchange Trading Agreements 1, (Apr. 20, 1994) (unpublished manuscript, presented at the International Monetary Fund Seminar on Current Legal Issues Affecting Central Banks, Washington, D.C., May 18, 1994, on file with the International Monetary Fund).

15. *The Last of the Good Times?*, ECONOMIST, Aug. 15, 1992, at 61.

### A. *The Basic Terms*

The most basic and common foreign exchange transaction is a spot.<sup>16</sup> A spot contract involves a commitment by one party to deliver a specified quantity of one currency against another party's delivery of a specified quantity of a second currency. In effect, each party is buying one currency and paying for it with another currency. The date the commitment is made is the trade date. The value date, which is the date on which the reciprocal deliveries occur, is within two business days of the trade date.<sup>17</sup>

For example, suppose on November 1 Citibank and the Development Bank of Singapore ("DBS") enter into a dollar-yen spot foreign-exchange transaction.<sup>18</sup> Citibank agrees to buy 120 million yen from DBS in exchange for U.S. dollars at a price, or exchange rate, of 104 yen per dollar.<sup>19</sup> Hence, Citibank pays DBS \$1,153,846.15 for the yen. Payment of the dollars, and the reciprocal yen payment, must occur on the value date, November 3.

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16. See CENTRAL BANK SURVEY, *supra* note 3, at 16 ("The spot market is still the single most important segment of the foreign exchange market.").

17. See *id.* at 16. Thus, in a spot foreign exchange transaction, the settlement of payment obligations is said to occur on "T+2" (where "T" stands for the trade date). Settlement occurs, however, on T+1 in the spot markets for Mexican pesos and Canadian dollars. The analysis and arguments in this article are equally applicable to a forward foreign exchange transaction, i.e., one in which the value date is more than two days after the trade date.

18. Citibank is a commercial bank headquartered in New York. DBS is a commercial and investment bank headquartered in Singapore. The parties are deliberately put in different parts of the world not only to simulate real-world conditions but also to illustrate that trading in many different currencies occurs far away from the home countries of those currencies.

Non-bank parties—such as corporations, institutional investors, individual investors, and governments (mainly central banks)—actively participate in the foreign exchange market. Inter-bank dealing, however, accounts for 70 percent of total market activity. See CENTRAL BANK SURVEY, *supra* note 3, at 1, 11-12; Manire, *supra* note 7, at 1183. Of the transactions between interbank dealers, 41 percent are with dealers located abroad and 29 percent are with dealers in the same jurisdiction. CENTRAL BANK SURVEY, *supra* note 3, at 11-12.

19. In practice, exchange rates are quoted in more precise terms because finer movements are observed that result in large profits and losses. The dollar-yen rate is quoted in terms of hundredths of yen per dollar. For example, the rate on Friday, April 15, 1994 was 103.45 yen per dollar. *Currency Trading—Exchange Rates*, WALL ST. J., Apr. 18, 1994, at C15.

DBS need not actually possess 120 million yen at the time that it enters into a spot contract to sell yen. If it did not, it would be short selling—that is, selling foreign currency that is not held. For an example of selling 400 million pounds short against the dollar, see ANDREW J. KRIEGER, *THE MONEY BAZAAR: INSIDE THE TRILLION-DOLLAR WORLD OF CURRENCY TRADING* 65-79 (1992). If DBS sells yen short, it will have to obtain 120 million yen to cover its short position before it is contractually obligated to deliver the yen to Citibank's designated account on the appropriate value date.

DBS could cover its short position in a number of ways. First, it may take a long position in another spot transaction, for instance, buy yen in the spot market. DBS risks losing money if the spot rate for yen rises above 104 yen per dollar. Suppose the yen appreciates relative to the dollar to 103 yen per dollar. Then, DBS will have to buy 120 million yen at the market rate of 103 yen per dollar and sell them to Citibank at the previously agreed rate of 104 yen per dollar. The purchase will cost DBS \$1,165,048.54, but the sale will fetch only \$1,153,846.15, resulting in a loss of \$11,202.39. Of course, DBS would not short sell yen if it thought yen would appreciate. It expects to profit by buying 120 million yen at, say, 107 yen per dollar and selling the yen at 105 yen per dollar. A second way for DBS to cover a short sale is to enter into a foreign currency option transaction. DBS could buy a call option on yen. This option would entitle DBS to obtain yen at a pre-set price.



## B. *Negotiating the Deal*

The dollar-yen spot agreement is reached between foreign exchange traders at Citibank and DBS through direct telephone negotiations.<sup>20</sup> The telephone conversations are tape recorded by each of the parties.<sup>21</sup> Either Citibank or DBS may initiate the transaction. Assume a Citibank trader in New York calls a trader at DBS in Singapore. The Citibank trader asks for "a quote on dollar-yen," but does not necessarily indicate whether she intends to buy or sell yen.<sup>22</sup> The custom in the foreign exchange market is to quote "two-way rates," i.e., both the bid and offer prices.<sup>23</sup> The DBS trader does not learn the Citibank trader's intention until the Citibank trader proposes a specific trade.<sup>24</sup>

Assume the DBS trader tells her counterpart at Citibank that the bid-offer rates are "105-104."<sup>25</sup> The Citibank trader indicates a desire to buy 120 million yen. The DBS trader responds "120 million yen, yours, at 104." At that juncture, according to the custom in the foreign exchange market, the traders believe a spot contract is established for the sale of 120 million yen by DBS to Citibank at a price of 104 yen per dollar. Citibank is

20. See RUDI WEISWEILLER, *INTRODUCTION TO FOREIGN EXCHANGE* 14 (2d ed. 1984) (stating foreign exchange traders may transact by telephone); Thomas M. Campfield & John G. O'Brien, *Foreign Exchange Trading Practices: The Interbank Market*, in *INTERNATIONAL FINANCE HANDBOOK* § 2.4, at 3 (Abraham M. George & Ian H. Giddy, eds., 1983) (noting "[m]odern sophisticated communications" like telephones link market participants).

An alternative way for the Citibank and DBS traders to communicate directly is through an electronic messaging system. Such computer-to-computer communication requires the banks to be members of the same automated dealing system. The systems are sponsored by third-party vendors such as Reuters. About one-third of all foreign exchange deals are concluded through these systems. See *CENTRAL BANK SURVEY*, *supra* note 3, at 21, 24. The effect of automated dealing on the resolution of the scope and enforceability problems is beyond the scope of this article.

As an alternative to direct dealing, the Citibank and DBS traders might deal with each other indirectly through one or more foreign-exchange brokers who act as agents for their respective principals. See Bhala, *supra* note 2, at 100. Around one-third of all foreign exchange transactions between inter-bank dealers are arranged through brokers. See *CENTRAL BANK SURVEY*, *supra* note 3, at 21 tbl. VI, 23-24. All telephone conversations between the traders and their respective brokers, and between the brokers, would be taped. Consequently, the analysis presented herein is unaffected by the use of brokers.

21. Tape recording the telephone conversations between foreign exchange traders is customary practice in the currency bazaar. Telephone interview with Philip Hennell, Kim Eng Securities, New York, N.Y. (June 14, 1994).

22. See KRIEGER, *supra* note 19, at 31.

23. Because Citibank is willing to act as either a buyer or seller in any foreign exchange transaction, it contributes importantly to market liquidity. It will take either side of the spot deal.

24. See KRIEGER, *supra* note 19, at 31.

25. These rates are expressed in terms of number of yen per dollar. The bid price of 105 yen per dollar reflects the exchange rate at which DBS is ready, willing, and able to buy yen. The offer (or asking) price of 104 yen per dollar reflects the rate at which DBS is ready, willing, and able to sell yen.

The difference of one yen per dollar between the bid and offer prices is the "spread." The bid price necessarily must be lower than the offer price. If it were not, then DBS would perpetually lose money. DBS would buy yen at a higher price and be forced to sell at a lower price. At the 105-104 rates, a 120 million yen transaction implies that DBS will pay \$1,142,857.14 to buy the yen. The rates also imply that DBS will receive \$1,153,846.15 from selling the yen. The spread assures that DBS can buy and re-sell the yen for a profit of \$10,989.01.

obligated to deliver \$1,153,846.15 to DBS in two days. Conversely, DBS is obligated to deliver 120 million yen to Citibank in two days. The word "yours" is the magic trade term indicating entry into a spot contract.<sup>26</sup>

After the traders conclude their conversation, each trader fills out a deal ticket.<sup>27</sup> The ticket states the name or initials of the trader, name of the counterparty, trade and value dates, type and amount of currency purchased, exchange rate, and payment (i.e., currency delivery) instructions. Citibank and DBS do not exchange deal tickets. Rather, the tickets are used by each bank for internal accounting and control purposes, for example, to monitor the total amounts of yen, dollars, marks, pounds, and other currencies bought and sold by the bank.

In addition, Citibank and DBS might use the deal tickets as a basis for preparing written confirmations of the transaction. In many, but not necessarily all, foreign exchange transactions, the parties exchange two confirmations.<sup>28</sup> First, the traders exchange confirmations of the terms of the transaction by telex. Second, the operations departments of the respective parties exchange confirmations, usually by mail.<sup>29</sup> This article analyzes

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26. After the traders conclude the transaction, employees of the operations department of each bank may endeavor to confirm the terms of the transaction. Citibank's operations department may send a written confirmation of the transaction to the operations department at DBS, and vice versa. Each operations department may check the confirmation received with its own records of the transaction. These records will include the tape recording of the transaction, coupled with any written record. Naturally, the written confirmations should match the records of the deal.

How do Citibank and DBS ascertain the designated account of the other to which the currencies must be delivered on the value date? The currencies are delivered to designated accounts of each bank. DBS will inform Citibank of its bank account name and number at which the dollars are to be delivered, and DBS will inform Citibank of the account name and number to which the yen must be transferred. The exchange of account information, or settlement instructions, may occur as part of the written confirmation process. Alternatively, assuming Citibank and DBS routinely trade with one another, they may have previously exchanged settlement instructions. Finally, Citibank and DBS may have signed a master agreement such as the IFEMA and set forth settlement instructions therein.

27. The telephone negotiation lasts only several seconds or a few minutes. In order to profit, foreign exchange traders must conclude transactions rapidly for two reasons. First, foreign exchange rates are volatile even in the short-term. The price quoted on a currency can move dramatically in seconds. If there is a delay in negotiating a transaction, then a prospective buyer or seller of a currency may elect not to proceed because exchange rates have changed such that the originally quoted rate is now an off-market rate, or no longer a rate at which the transaction would be profitable.

Second, profits are generated by market participants like Citibank, DBS, and their brokers by entering into a large volume of transactions. With respect to highly liquid currencies like the U.S. or Canadian dollar, Swiss or French franc, Japanese yen, German mark, and English pound, the bid-offer spread is small. Consequently, a large volume of purchase and sale transactions are necessary. A smaller number of high-risk trades, such as betting correctly against perceived market trends, are also a source of profits. Naturally, the pressure to conclude transactions rapidly makes oral negotiation by telephone an ideal means in the decentralized, global currency bazaar.

28. Telephone interview with Philip Hemnell, Kim Eng Securities, New York, N.Y. (June 16, 1994).

29. This department is also known as the "settlements department" or "back office." In addition to exchanging confirmations, the operations departments exchange payment instructions, usually by electronic means, through the Society for Worldwide Interbank Financial Telecommunications (SWIFT).

the case where Citibank and DBS do not exchange these confirmations, as well as the case where they are exchanged.<sup>30</sup>

### C. *The Dispute*

Shortly after the deal is concluded, the bid-ask spread moves from 105-104 to 107-106 yen per dollar. The Citibank trader observes that as a result of short-term volatility, the financial asset (yen) she is buying has depreciated relative to the currency (dollars) in which she will render payment. Accordingly, she backs out of the deal with DBS and buys 120 million yen from a third bank at the cheaper rate of 106 yen per dollar.<sup>31</sup> In the meantime, the DBS trader has rejected offers from other banks to buy the yen.

DBS learns of Citibank's unscrupulous action no later than the value date. At that point, DBS transfers 120 million yen to Citibank but does not receive the reciprocal payment of \$1,153,846.15. The DBS trader insists on selling 120 million yen at the original exchange rate of 104 yen per dollar. After all, it relied on Citibank's oral representations and turned down other opportunities to sell the yen at this rate.<sup>32</sup> Citibank refuses to go through with the transaction.

Thus, DBS sues Citibank for breach of contract in the appropriate federal court. Citibank argues that U.C.C. Article 2 applies to the dispute and raises the affirmative defense that if there was a spot contract, then it is unenforceable under the statute of frauds set forth in section 2-201.<sup>33</sup> Because there is no signed writing to evidence the contract, Citibank argues, this statute is not satisfied.<sup>34</sup> DBS's response is that the scope of Article 2 of the U.C.C. does not encompass foreign exchange transactions, hence the statute of frauds is inapplicable.

The thesis of this article implies that Citibank's defense should be rejected and, while DBS's response may have some merit, it too should be rejected. DBS's response is an over-reaction. The pragmatic strategy suggests that whether foreign exchange transactions ought to fall within the scope of Article 2 depends on a comprehensive assessment of the provisions of Article 2 in relation to the needs of foreign exchange market par-

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30. For the case where confirmations are not exchanged, see *infra* notes 107-156 and accompanying text. For the case where confirmations are exchanged, see *infra* notes 167-216 and accompanying text.

31. At the cheaper rate, 120 million yen cost \$1,132,075.41, as compared with \$1,153,846.15 at the original rate of 104 yen per dollar. If the yen appreciated relative to the dollar, then a dispute could arise because DBS sought to renege on the deal with Citibank and sell 120 million yen at the new, higher market rate to a third party.

32. Of course, it is not reliance that leads to the creation of a contract; there is a contract here. Citibank and DBS have certain expectations that contract law is designed to protect regardless of the reliance factor.

33. See U.C.C. § 2-201 (1990). Throughout this article, unless otherwise noted, the references to the U.C.C. are to the 1990 Official Text, approved and published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Note that Citibank's defense raises the possibility of the judicial admissions exception to the statute of frauds. See U.C.C. § 2-201(3)(b). This issue is not addressed herein.

34. Citibank does not dispute that a contract was formed. *Cf.* U.C.C. § 2-204(1) (stating that a contract may be made in any manner, including conduct by the parties).

ticipants. Examining the statute of frauds in relation to these needs is an important part of this assessment. The results of the examination, however, cannot be dispositive because there is obviously more to Article 2 than section 2-201. Citibank's defense should be rejected, and the contract enforced, because the statute of frauds does not meet the needs of market participants. The statute should be modified or reinterpreted to conform with these needs.

### III. SCOPE—SHOULD FOREIGN EXCHANGE BE A “GOOD”?

*Without question the [Uniform Commercial] [C]ode was designed to bring the body of commercial law into the contemporary world of business. . . . Its principal purpose was to meet the contemporary needs of a fast moving commercial society.<sup>35</sup>*

The wisdom of the *General Electric Credit* decision is lost on courts and regulators struggling with problems in the currency bazaar. Courts and regulators understand that sales law is needed to establish precisely the rights and obligations of Citibank and DBS in the dollar-yen spot transaction. Yet, these decision-makers employ conventional, sequential reasoning to the dispute: first, decide the scope of U.C.C. Article 2; second, consider the enforceability of the contract under section 2-201. Thus, until the scope of sales law is clear, the risks of engaging in spot transactions cannot be allocated with precision.

In their haste to establish rights and duties, courts take a carelessly inclusive approach to the scope issue. Regulators, in contrast, take an aggressively exclusive approach. Both approaches are imprudent. The pragmatic strategy says the conventional, sequential reasoning is rigid. Courts and regulators should first determine if Article 2 works for the currency bazaar; in the words of *General Electric Credit*, does it meet the “contemporary needs of a fast moving” market?<sup>36</sup> Only then should courts and regulators consider whether the scope of Article 2 ought to include transactions in that bazaar.<sup>37</sup>

#### A. *The Carelessly Inclusive Approach*

Many courts fail to discuss adequately why U.C.C. Article 2 governs transactions in the currency bazaar. They assume it applies, but provide scant analysis of the language of Article 2 to support this assumption. Courts disregard the implications to the foreign exchange market of applying Article 2 to spot transactions.

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35. *General Electric Credit Corp. v. R.A. Heintz Construction Co.*, 302 F. Supp. 958, 967-8 (D. Or. 1969).

36. *Id.* at 968.

37. A short-cut solution to the problem of scope would be to rely on the first clause of U.C.C § 2-102 which states, “[u]nless the context otherwise requires.” It could be argued that even if foreign exchange is not a “good,” the context mandates the application of Article 2 to foreign exchange transactions.

### 1. The Five Careless Courts

No fewer than five decisions adopt this carelessly inclusive approach to the problem of applying U.C.C. Article 2 to foreign exchange transactions. Consider the opinion of a New York appellate court in *United Equities Co. v. First National City Bank*.<sup>38</sup> The court decided a claim arising from a dollar-yen forward foreign exchange transaction.<sup>39</sup> The parties did not dispute the applicability of Article 2. The court nonchalantly applied Article 2 without considering whether the transaction involved the sale of "goods."<sup>40</sup>

In *Saboundjian v. Bank Audi (USA)*, a New York appellate court again neglected to explore carefully the reason Article 2 applies to foreign exchange transactions.<sup>41</sup> There, a bank failed to execute an oral foreign exchange order from its customer who unreasonably declined to mitigate his damages. The court asserted that "[t]he Uniform Commercial Code is applicable to foreign exchange transactions, since 'the Code excludes "money" only when it is a medium of payment, not when treated as a commodity.'"<sup>42</sup> The decision provided no theory for a distinction between money as the subject of a contract and money as the medium of payment.

In *Intershoe, Inc. v. Bankers Trust Co.*, the New York Court of Appeals considered whether a written confirmation slip of a foreign exchange transaction is the final expression of the parties' agreement for purposes of the parol evidence rule.<sup>43</sup> The court baldly stated: "[t]here seems to be no question that the UCC applies to foreign currency transactions."<sup>44</sup> In *Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, the U.S. District Court for the Southern District of New York uncritically relied on the *Intershoe* decision and applied the Article 2 parol evidence rule to disputed foreign currency conversions.<sup>45</sup>

Finally, in *Koreag v. Refco F/X Associates, Inc.*, the U.S. Court of Appeals for the Second Circuit provided only a sketchy overview of the meaning of "goods" under section 2-105. This overview justified the court's application of Article 2 to foreign exchange transactions between a New York corporation, Refco, and a Swiss bank, Mebco. The court granted Refco, as the seller of U.S. dollars, a right to reclaim the dollars from Mebco, an

38. 383 N.Y.S.2d 6 (N.Y. App. Div. 1976), *aff'd*, 395 N.Y.S.2d 640 (N.Y. 1977).

39. United Equities entered into a contract on April 12, 1971 for the purchase of 360 million yen against \$1,018,710. Under the six-month forward contract, the yen were to be delivered on Oct. 14, 1971. Between the trade and value dates the Japanese government declared that non-residents could not open a yen-denominated bank account if they did not already have one before Sept. 6, 1971. United Equities lacked such an account, and thus it was unable to receive delivery of the yen. 383 N.Y.S.2d at 7-8. *See also* discussion regarding forward transactions *supra* note 17.

40. *See United Equities*, 383 N.Y.S.2d at 9-13; *cf.* U.C.C. §§ 2-102 and 2-105(1) (discussing the scope of the Article and definition of "goods," respectively).

41. 556 N.Y.S.2d 258 (N.Y. App. Div. 1990).

42. *Id.* at 262 n.2 (citing New York Annotations to U.C.C. § 2-105 at 97).

43. 568 N.Y.S.2d 333 (N.Y. 1991); *see also* Steven Lipin, *Bankers Trust Wins Suit on Currency Deal*, AM. BANKER, Apr. 2, 1991, at 2. The facts of *Intershoe* are discussed *infra* note 193.

44. *Intershoe*, 568 N.Y.S.2d at 336 (citations omitted).

45. 785 F. Supp. 411, 431 (1992) [hereinafter *IBJ*]. The facts of *IBJ* are discussed *infra* note 202.

insolvent buyer.<sup>46</sup> The court failed to consider whether this remedy is inconsistent with other provisions of the U.C.C., namely, the receiver finality rule of Article 4A.<sup>47</sup>

Perhaps these courts carelessly applied Article 2 to foreign exchange transactions because the official commentary thereto sometimes invites application by analogy. Official comment 1 to section 2-105 states that while investment securities are expressly excluded from the scope of Article 2,

[i]t is not intended by this exclusion . . . to prevent the application of a particular section of this Article by analogy to securities . . . when the reason of that section makes such application sensible and the situation is not covered by the Article of this Act dealing specifically with such securities (Article 8).<sup>48</sup>

Judges may reason that even if they are incorrect as a matter of law about the scope of Article 2, the statute encourages courts to apply it where appropriate by analogy.

Such reasoning is specious. There is no such invitation issued by the official commentary to judges adjudicating cases involving foreign currency. Moreover, direct application provides parties with the certainty that the entire statute governs. In contrast, application by analogy empowers the court to pick and choose among the provisions of Article 2. Selective application breeds uncertainty.

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46. 961 F.2d 341, 356 (2nd Cir. 1992). In *Koreag*, Refco engaged in two types of spot foreign exchange transactions with Mebco. First, Refco bought foreign currency from Mebco for \$7.4 million U.S. dollars. On April 28, 1989, Refco transferred \$7.4 million by wire to Mebco. Second, Refco sold \$4.1 million worth of foreign currencies to Mebco in exchange for U.S. dollars. Between April 28 and May 2, 1989, Refco transferred these currencies by wire to Mebco. Mebco, however, was declared insolvent and closed by the Swiss bank regulatory authority on April 27, 1989. The closure occurred before Mebco transferred the foreign currencies Refco had bought for \$7.4 million, and before Mebco paid Refco for the \$4.1 million in foreign currencies. Refco sought to reclaim the \$7.4 million and the foreign currencies it had transferred to Mebco. *Id.* at 344-46.

With respect to the first type of transaction, the court found that Refco was a seller of U.S. dollars and, therefore, was entitled to reclaim the foreign currencies—the “goods”—under U.C.C. §§ 2-310(a), 2-507(2), and 2-702(2). *Id.* at 355-56. Sections 2-310(a) and 2-507(2) are relevant if the foreign exchange transaction is considered a cash sale. U.C.C. § 2-310(a) provides that “[u]nless otherwise agreed, payment is due at the time and place at which the buyer is to receive the goods. . . .” Section 2-507(2) indicates that “[w]here payment is due and demanded on the delivery to the buyer of goods . . . , [the buyer’s] right as against the seller to retain or dispose of them is conditional upon his making the payment due.” The *Koreag* court found the interaction of these two sections “to create a seller’s right to reclaim goods from an insolvent buyer who takes possession of the goods, but fails to tender payment” [citations omitted]. 961 F.2d at 356. Section 2-702(2) is relevant if the transaction is considered a credit sale. The existence of a seller’s right of reclamation in the case of a credit sale is clear from the statutory language; § 2-702(2) states, “[w]here the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after [their] receipt.” *See also infra* note 74.

With respect to the second type of transaction, the court stated that Refco was a buyer of U.S. dollars and, therefore, Article 2 did not provide a right equivalent to reclamation. *Koreag*, 961 F.2d at 357.

47. *See infra* note 74.

48. U.C.C. § 2-105 cmt. 1; *see also* B.N.E., *Swedbank, S.A. v. Banker*, 1993 U.S. Dist. Lexis 2699 (S.D.N.Y. Mar. 10, 1993) (applying the parol evidence rule of § 2-202 in a case involving transactions in debt securities of less developed countries).

The failure of the five courts to assess carefully the scope of Article 2 cannot be tolerated because the stakes in the trillion-dollar-a-day currency bazaar are high. A plenary extension of Article 2 to the currency bazaar must be accompanied by a close reading of the relevant scope provisions of Article 2. Such a reading suggests the issue is more complex and subtle than the courts have acknowledged, and that non-conventional reasoning is needed.

## 2. Statutory Ambiguity

The first and most important point to acknowledge is that the language of U.C.C. Article 2 does not clearly indicate whether a foreign exchange transaction is included within its coverage. The starting point is section 2-102, which provides that Article 2 applies to "transactions in goods." Nowhere in Article 2 is "transaction" defined.<sup>49</sup> Surely the purchase of yen and sale of dollars by Citibank qualifies as a "transaction" as distinct from a "security transaction" governed by Article 9.<sup>50</sup> Moreover, the Citibank-DBS deal entails neither the provision of a service nor a lease of currency.

The lack of such complications has an important repercussion. The common law has developed the "essence" or "predominant factor" test for deciding whether hybrid contracts and sale-lease deals are subject to Article 2.<sup>51</sup> Problems in deciding whether to apply Article 2 to a hybrid sale-service contract, or categorizing a transaction as a sale governed by Article 2 or a lease governed by Article 2A, do not exist with respect to foreign exchange transactions.<sup>52</sup> Accordingly, the well-developed commercial law jurisprudence on these matters is inapposite. Similarly, frequently used treatises are unhelpful because they dwell on hybrid contracts and sale-lease agreements.<sup>53</sup> In the currency bazaar, an entirely new approach to the scope of Article 2, such as the pragmatic strategy advocated herein, is needed.

The crux of the scope problem, as the *Koreag* court acknowledged, is that the subject of a spot foreign exchange transaction (a currency issued

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49. There are hints in Article 2 that the drafters meant that a "transaction" is a "sale." For example, U.C.C. § 2-101 provides that the title of Article 2 is "[s]ales." Section 2-106(1) indicates that a "contract" or "agreement" refer to a "sale of goods." Many sections of Article 2 refer to a buyer and seller. Nevertheless, it is curious that the drafters chose the word "transaction" in § 2-102 instead of "sale."

50. See U.C.C. § 9-102. U.C.C. § 2-102 and the official comment thereto make clear that a "transaction" does not include a security transaction.

51. This judicially-created test asks whether the sale of a good was the essence of the contract, or the predominant factor in the transaction, or whether it was merely incidental or collateral to the provision of a service, sale of real estate, or a lease arrangement. See, e.g., *Triangle Underwriters v. Honeywell*, 604 F.2d 737 (2d Cir. 1979) (holding that the essence of a contract was the sale of goods and the provision of services was merely incidental to that sale); *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974) (discussing the predominant factor test).

52. For a discussion of these problems, see Note, *Disengaging Sales Law from the Sale Contract: A Proposal to Extend the Scope of Article 2 of the UCC*, 96 HARV. L. REV. 470 (1982).

53. See, e.g., JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-1 at 25-26 (3rd ed. 1988) [hereinafter WHITE AND SUMMERS].

by the United States, foreign country, or internationally recognized economic zone<sup>54</sup>) is not necessarily a "good."<sup>55</sup> According to section 2-105(1), "goods" are "all things . . . which are *movable* at the time of identification to the contract for sale other than the *money in which the price is to be paid* . . . and *things in action*."<sup>56</sup> Movability is central to the concept of a "good."<sup>57</sup> Undoubtedly, foreign exchange in the form of physical currency is movable.<sup>58</sup> On the value date, Citibank is entitled to receive delivery of 120 million yen in physical currency, and DBS is entitled to get \$1,153,846.15 in physical currency. The yen and dollar notes could be shipped to the respective parties.

In practice, however, participants in the foreign exchange market—in contrast to a tourist buying foreign currency—do not receive physical delivery of cash. Foreign exchange is transferred from a seller to buyer by a funds (or wire) transfer.<sup>59</sup> A 120 million debit in yen is entered electronically to the bank account of DBS, and a corresponding credit is entered to Citibank's bank account. A debit of \$1,153,846.15 is made to Citibank's bank account and a credit of that amount is made to the bank account of DBS. The transfer of yen and dollars around the world occurs in seconds. Thus, buying foreign exchange in the interbank market typically involves buying a bank balance, or bank deposit obligation, denominated in a foreign currency.<sup>60</sup>

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54. There is an active spot market for the European Union's European Currency Unit (ECU); thus, it would be incomplete to think only in terms of currency issued by individual sovereign nations.

55. 961 F.2d 341, 355 ("[a]s a threshold matter, therefore, it must be determined whether the foreign currencies that Refco and Mebeo agreed to exchange were 'goods' within the meaning of section 2-102.").

56. U.C.C. § 2-105(1) (emphasis added). Identification of goods occurs when the contract is made if, as in the hypothetical foreign exchange transaction, it is for the sale of goods already existing and identified. U.C.C. § 2-501(1)(a); *see also infra* note 60. "Money" is defined in U.C.C. § 1-201(24) as "a medium of exchange authorized or adopted by a domestic or foreign government as part of its currency." Thus, money is not narrowly viewed as legal tender, but rather that which has the sanction of government. U.C.C. § 1-201 cmt. 24.

57. U.C.C. § 2-105 official cmt. 1.

58. Manire, *supra* note 7, at 1193, 1196 (erroneously stating that foreign exchange transferred through banking channels—by which he presumably means wire transfer—is not moveable). *See also infra* note 59 and accompanying text.

59. Funds transfers are more commonly known as "wire transfers." *See generally* Ernest T. Patrikis, Thomas C. Baxter, Jr., and Raj Bhala, *Article 4A: The New Law of Funds Transfers and the Role of Counsel*, 23 UCC L.J. 219 (1990) (discussing U.C.C. Article 4A, which governs funds transfers, and other relevant laws, regulations, and private rules).

60. *See* GLENN G. MUNN, *ENCYCLOPEDIA OF BANKING AND FINANCE* 401 (F.L. Garcia ed., 8th ed. 1983). Foreign exchange transactions "are more accurately described as the transferring by individuals or corporations in one country of credits or debits through their banks by obtaining credits or debits on the books of the banks in other countries that are correspondents or branches of the banks through which the transmission is arranged." *Id.*

An interesting question is whether foreign exchange is identified to the contract. The definition of "goods" in U.C.C. § 2-105(1) indicates that the thing is movable "at the time of identification to the contract for sale." Trading foreign exchange entails entering debits and credits electronically to bank accounts maintained on computers. In a traditional sense—a tangibility paradigm—identification might mean that the buyer of foreign exchange withdraws the funds purchased, handles the physical currency, and re-deposits this currency. Arguably, if foreign exchange is not identified to the contract because of its intangible, electronic nature, then it cannot be a "good" for purposes of Article 2.



Are movable funds like yen and dollars the "money in which the price is to be paid" and, therefore, excluded from being "goods"? The official comment to section 2-105 indicates that foreign currency is not automatically excluded by this phrase:

The exclusion of "money in which the price is to be paid" from the definition of goods does *not* mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.<sup>61</sup>

The official comment suggests that every foreign exchange transaction consists of two legs, a "commodity leg" and a "payment leg." The Practice Commentary to New York's codification of the definition of "goods" reinforces the bifurcation: "'money', other than the money in which the price is to be paid, is included in the definition of 'goods': thus a contract for sale of coins or of *foreign currency* is a contract for sale of goods."<sup>62</sup>

Citibank buys yen and pays dollars. The transfer of yen is the "commodity leg," while the transfer of dollars is the "payment leg." From DBS's perspective as a buyer,<sup>63</sup> the situation is the reverse: it buys dollars with yen, thus the dollar transfer is the commodity leg and the yen transfer is the payments leg. If both parties are viewed as buyers, then there is an inconsistency in the legs. Accordingly, one party must be viewed as a seller.<sup>64</sup> DBS, for example, sells yen and receives dollars for the sale. Then, the commodity leg from both parties' perspective is the yen transfer, and the payment leg is dollars.<sup>65</sup>

Nevertheless, the movable yen in the commodity leg may be excluded from the U.C.C. section 2-105(1) definition because the yen are "things in action." The *Intershoe* and *Koreag* courts neglect to consider this possibility. Those courts read the definition of "goods" in U.C.C. section 2-105 as if it stopped with the phrase "other than the money in which the price is to be paid." A "thing in action" is not defined in Article 2. It "denotes a claim or right to personal property not in one's possession, as distinguished from property actually in one's possession."<sup>66</sup> The factual predicate for

61. U.C.C. § 2-105 cmt. 1 (emphasis added).

62. N.Y. U.C.C. § 2-105 Practice Commentary note 2 (McKinney 1964) (emphasis added).

63. A "buyer" is "a person who buys or contracts to buy goods." U.C.C. § 2-103(1)(a) (1989).

64. A "seller" is "a person who sells or contracts to sell goods." *Id.* § 2-103(1)(d).

65. It is not strictly necessary for the transaction to have a purchase price in money in order to be governed by Article 2. U.C.C. § 2-304(1) addresses barter transactions, i.e., situations where a good is paid for with something other than money. The purchase price "can be made payable in money or otherwise." U.C.C. § 2-304(1). Because the word "otherwise" includes any form of consideration sufficient to support a contract, it covers foreign currency. *See, e.g.,* *Mortimer B. Burnside & Co. v. Havener Sec. Corp.*, 269 N.Y.S. 724, 726 (N.Y. App. Div. 1966). However, viewing the dollar-yen spot transaction as barter instead of a purchase of yen with money (namely, dollars), or a purchase of dollars with money (namely, yen) would be inappropriate because both dollars and yen are "money" as defined in U.C.C. § 1-201(24). *See supra* note 56.

66. GLENN G. MUNN ET AL., *ENCYCLOPEDIA OF BANKING AND FINANCE* 181 (9th ed. 1991). The above-quoted definition concerns a "chose" in action which is the same as a "thing" in

classifying yen as a thing in action is intimated above. Citibank is buying a bank credit (an intangible, electronic bank balance, not physical currency) denominated in yen.<sup>67</sup> As one court put it, "[e]ven when the obligation is performed and the credit established, the customer is only the owner of an obligation or chose in action and not of any actual foreign money."<sup>68</sup>

The rationale in two pre-U.C.C. cases seems to contemplate the distinction between physical currency and things in action. In the 1922 case of *Melzer v. Zimmerman*, a New York Supreme Court considered whether the sale of Austrian currency, kronen, was governed by New York's Personal Property Law ("PPL") as a sale of goods.<sup>69</sup> The contract called for delivery of physical currency to the buyer. The court stated the contract in dispute "was an agreement for the purchase by the plaintiff and a sale by the defendant over the counter of said Austrian kronen in the form of currency, and not a deposit account payable by such a draft."<sup>70</sup> Accordingly, the contract fell within the ambit of the PPL. Similarly, in a 1925 case, *Zimmerman v. Roessler & Hasslacher Chemical Co.*,<sup>71</sup> a New York appellate court considered whether a contract for the sale of marks involved "goods" under New York's former Sales of Goods Act. The court observed that the contract contemplated the delivery of marks, not the credit of marks to a bank account, because the parties did not specify a time or

action. A "chose in action" is defined in a manner similar to the meaning of a "thing in action," namely, as "a right of bringing an action or right to recover a debt or money." BLACK'S LAW DICTIONARY 241, 1479 (6th ed. 1990). Moreover, "chose" is the French word for "thing." The drafters of the U.C.C. undoubtedly sought to simplify and modernize terminology. See U.C.C. § 1-102(2)(a). "Things in action" are discussed in Alphonse M. Squillante, *Commercial Code Review*, 76 COM. L.J. 42 (1971).

67. See Manire, *supra* note 7, at 1192 (concluding that foreign exchange transactions involve the sale of choses in action). Indeed, in 1955 the New York Law Revision Commission stated in its study of the Uniform Commercial Code that:

The more limited exclusion of "the money in which the price is to be paid" is designed to permit the Sales Article to govern a transaction when, in the language of Comment 1, "money is being treated as a commodity": a sale of an ancient Roman coin or a modern coin collection. This leads one on the question whether the Sales Article reaches a transaction for the exchange of dollars into pounds or pesos. Comment 1 (fourth paragraph) contains language which supports such coverage. But the provisions of the Sales Article hardly seemed designed to cope with foreign exchange transactions; perhaps they would be excluded from the article on the ground that they do not involve "things . . . movable" or in any event are "things in action". [sic]

1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 362 (1955).

68. *Samuels v. E.F. Drew & Co.*, 296 F. 882, 886 (2d Cir. 1924); see also Manire, *supra* note 7, at 1192 n.138 (citing other relevant cases). Of course, even if a court decides foreign exchange is a chose in action, it may well apply Article 2 by analogy. See, e.g., *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978) (applying the U.C.C. by analogy to a sale of a chose in action) *overruled by Bahre v. Pearl*, 595 A.2d 1027 (Me. 1991). For scholarly treatments of the application of the U.C.C. by analogy, see Jane P. Mallor, *Utility "Services" under the Uniform Commercial Code: Are Public Utilities in For a Shock?*, 56 NOTRE DAME LAW. 89 (1980); Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971).

69. 194 N.Y.S. 222, 223-24 (N.Y. Sup. Ct. 1922), *aff'd*, 198 N.Y.S. 932 (N.Y. App. Div. 1923). The *Melzer* court relied on an 1847 decision, *Peabody v. Speyers*, 56 N.Y. 230 (1874).

70. *Melzer*, 194 N.Y.S. at 223.

71. 207 N.Y.S. 370 (N.Y. App. Div. 1st Dept.), *aff'd*, 148 N.E. 659 (1925).

bank account for such a credit. Accordingly, the contract was held to involve "goods."<sup>72</sup>

The concept of "things in action" and pre-U.C.C. cases suggest that the distinction between (1) a bank credit denominated in foreign currency; and (2) physical currency; should determine whether yen (or any other foreign currency) is a "good" under U.C.C. section 2-105(1). Foreign currency-denominated bank credits are "things in action." Such credits are rights to the payment of money, and these rights, which may be bought and sold in the market, are excluded from Article 2. The supporting logic is a strict interpretation of "goods": Article 2 applies only to paradigmatic goods, which in effect are tangible items, not to transfers of intangible interests such as interests in deposit accounts.

This distinction should not be dismissed lightly. An ill-considered expansion of Article 2 to include purchases and sales of bank credits would open the door to the inclusion of transfers of claims against insurers, corporate debt (to the extent not covered by U.C.C. Article 8), and accounts receivable (to the extent not governed by U.C.C. Article 9). The reach of Article 2 would extend to a far broader array of commercial and financial transactions than its drafters ever envisioned, and the provisions of Article 2 might be ill-suited to the needs of the many and varied transactors. Nevertheless, for the reasons discussed below, the distinction and supporting logic are problematic.<sup>73</sup>

#### B. *The Aggressively Exclusive Approach*

The leading advocate of the aggressively exclusive approach is the Federal Reserve. For over two years it has acted through the Subcommittee on Payments (Subcommittee) of the American Bar Association's Committee on the Uniform Commercial Code and urged the Subcommittee to adopt a report calling for the exclusion of foreign exchange transactions from the scope of U.C.C. Article 2.<sup>74</sup> The Federal Reserve's position suffers from four serious flaws.

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72. 207 N.Y.S. at 371-72.

73. See *infra* notes 75-82 and accompanying text.

74. See, e.g., Letter from Thomas C. Baxter, Jr., Deputy General Counsel and Senior Vice President, Federal Reserve Bank of New York, to Members of the Subcommittee on Payments (Mar. 30, 1994) and the accompanying *Outline of Report of Subcommittee on Payments Concerning the Application of the Uniform Commercial Code to a Foreign Exchange Trade 2-7* (discussion draft, on file with author); Letter from Thomas C. Baxter, Jr., Counsel, Federal Reserve Bank of New York, to Members of the Subcommittee on Payments (Sept. 29, 1993) and the accompanying *Outline of Report of Subcommittee on Payments Concerning the Application of the Uniform Commercial Code to a Foreign Exchange Trade 2-4, 9-10* (second discussion draft, on file with author). See generally Thomas C. Baxter, Jr. & James H. Freis, Jr., *Resolving Funds Transfer Disputes Related to Currency Exchange Transactions: What Law Governs?*, COM. L. ANN. (forthcoming).

The key reason for the Federal Reserve's position is a fear that if such transactions are subject to Article 2, then the receiver finality rule of Article 4A of the U.C.C. will be undermined. Section 4A-405(c) provides that a funds transfer is final and irrevocable upon acceptance of a payment order by the beneficiary's bank on behalf of the beneficiary. U.C.C. § 4A-405(c), 2B U.L.A. 532 (1991). Thus, for example, when DBS's bank accepts dollars on behalf of DBS, the credit of dollars to the DBS account is final. The fear arises from the conclusion that under §§ 2-310(a), 2-507(2), and 2-702(2), a seller of foreign currency has a right to

### 1. The Stalemate of Pre-U.C.C. Cases

The position relies on outdated, pre-U.C.C. cases—*Melzer* and *Zimmerman*—for guidance in resolving modern-day international commercial and financial problems. The *Melzer* and *Zimmerman* courts were not faced with a large and rapidly growing global currency bazaar. These courts focused on the difference between accepting physical delivery of currency and a deposit account denominated in foreign currency payable by a draft drawn on a foreign correspondent bank.<sup>75</sup> This distinction is arcane insofar as foreign exchange typically moves from seller to buyer by funds transfer.

Furthermore, there are pre-U.C.C. cases that plainly support the proposition that a foreign exchange transaction involves the sale of a “good” or commodity. Three such cases, *Reisfeld v. Jacobs*,<sup>76</sup> *Liepman v.*

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reclaim currency from a buyer under certain circumstances. See *Koreag v. Refco F/X Associates, Inc.*, 961 F.2d at 356.

The Federal Reserve's fear, however, is unfounded. To say that the payment of the dollar or yen leg of the transaction between Citibank and DBS is final for purposes of funds transfer law is one matter. To say that the seller of the currency at issue has a right to reclaim under sales law is a separate matter. There is no inconsistency between the two statements; rather, they simply reflect different legal effects of certain actions. See Letter from Patricia B. Fry, Associate Dean for Academic Affairs and Professor of Law, University of North Dakota School of Law, to Raj Bhala, Assistant Professor of Law, Marshall-Wythe School of Law (Nov. 2, 1993) with attached draft letter from Patricia B. Fry to Thomas C. Baxter, Jr., Deputy General Counsel, Federal Reserve Bank of New York 2-4 (on file with author).

The Federal Reserve's concern that *Koreag* conflicts with *Donmar Enter., Inc. v. Southern Nat'l Bank of N. Carolina*, 828 F. Supp. 1230 (W.D.N.C. 1993) is also unfounded. See Letter from Thomas C. Baxter, Jr., Chairman and Deputy General Counsel, Federal Reserve Bank of New York, to Members of the Subcommittee on Payments (Oct. 18, 1993) (on file with author) (stating that *Donmar* “adds fuel to the fire because it seems to conflict with *Koreag*”). In *Donmar*, the plaintiff bought 280,000 pounds from Stephen's Trading Corporation (“STC”) for \$540,680. The plaintiff transferred by wire the U.S. dollars in two installments, the second one in the amount of roughly \$524,000, to the Southern National Bank (SNB). STC received this sum and, in turn, transferred it to a third party. When STC instructed SNB to pay 200,000 pounds to the plaintiff, SNB informed STC that STC's account lacked 200,000 pounds to make the payment. SNB informed the plaintiff of the insufficiency, and the plaintiff sought to recover the \$524,000 it had paid to STC. 828 F. Supp. at 1233-34.

The Federal Reserve's fear of an inconsistency between *Donmar* and *Koreag* is unfounded because the plaintiff in *Donmar*, in contrast to Refco in *Koreag*, never argued it was a seller of dollars under Article 2 and thereby entitled to a right of reclamation. Indeed, no Article 2 provision was raised in *Donmar*. The plaintiff argued that it had a right to reclaim the \$524,000 under § 4A-207 (which concerns payment orders that do not identify a beneficiary), and the court properly rejected the argument. *Donmar*, 828 F. Supp. at 1239.

Two additional concerns might lie behind the Federal Reserve's position. First, reclamation could allow a creditor of a failed bank to circumvent a foreign insolvency proceeding. Second, reclamation could undermine regulatory efforts to develop systems for netting (or off setting) foreign exchange delivery obligations among the players in the global currency bazaar. These concerns, like the fear discussed above, are dubious. See Raj Bhala, *Self-Regulation in Global Electronic Markets Through Reinvigorated Trade Usages*, 31 IDAHO L. REV. (forthcoming 1995) (manuscript at 33-35, on file with author).

75. See *Melzer*, 194 N.Y.S. at 223; *Zimmerman*, 207 N.Y.S. at 371.

76. 176 N.Y.S. 223 (N.Y. App. Div. 1919). In *Reisfeld*, the buyer purchased Russian rubles. At issue was whether the contract of purchase was enforceable under the statute of frauds in New York's Personal Property Law whose coverage excluded “money.” The notes were issued by the Tsarist government that had been overthrown in the 1917 Bolshevik revolution and, therefore, could not be used as a medium of payment. The court decided that because the buyer purchased the notes for resale, they were not excluded from the

*Rothschild*,<sup>77</sup> and *Richard v. American Union Bank*,<sup>78</sup> established an intended use test. They focused on the intent of the buyer of foreign currency to determine whether foreign currency is a commodity or a means of payment under the relevant statute of frauds. Under the reasoning of these cases, if Citibank intends to resell the 120 million yen, then the yen are commodities and fall within Article 2. Alternatively, if Citibank plans to use the yen in Japan to purchase goods (other than foreign currency) and services, then the yen are a medium of payment and excluded from the statute. All three cases held that foreign currency was a commodity subject to the relevant statute.<sup>79</sup> Thus, it is not difficult to line up pre-U.C.C. cases against, as well as for, the Federal Reserve's position.

Of course, the pre-U.C.C. cases against that position are as outdated and unworthy of reliance as the cases in the Federal Reserve's favor. For example, classifying foreign exchange as a commodity versus a medium of payment based on the buyer's intent raises doctrinal and evidentiary problems. Should an objective or subjective test be used to determine intention? How should intention be proved? Moreover, the distinction between resale and use as a medium of payment makes little sense. Suppose Citibank intends to resell the 120 million yen to another bank. Why should this case be treated differently from a case where a U.S. importer of Japanese goods buys 120 million yen in order to pay a Japanese exporter for the goods? Finally, the intended use test suggested by the *Reisfeld*, *Liepman*, and *Richard* courts is at variance with the plain meaning of "goods" in section 2-105. The U.C.C.'s definition does not contemplate a focus on anything other than the immediate transaction.<sup>80</sup> In sum, the net result from reviewing pre-U.C.C. cases is an unhelpful and essentially irrelevant stalemate.

## 2. A Formalistic Distinction

The second problem with the aggressively exclusive approach is that it relies on an overly formalistic distinction—physical currency versus bank credit—to determine the scope of U.C.C. Article 2. Just because Citibank

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statute. Its holding also rested on the characterization of the rubles as choses in action. *Id.* at 224.

77. 262 S.W. 685 (Mo. Ct. App. 1924). The contract in *Liepman* involved the purchase of marks and the issue was enforceability of the contract under a statute of frauds that covered goods but excluded "money." *Id.* at 685. Because the U.S. and Germany were at war, the court reasoned, the buyer could not have intended to use the marks as a medium of payment. Therefore, they were a commodity within the statute of frauds. *Id.* at 686.

78. 170 N.E. 532 (N.Y. 1930). This case involved a contract to buy two million Romanian lei. The contract called for a cable transfer of foreign currency into the buyer's bank account in Bucharest, but delivery was delayed and the buyer sued for damages. *Id.* at 533-34. The court held that the transaction was for a commodity because the buyer intended to resell the lei in the U.S., not spend the money in Romania. *Id.* at 535.

79. See *Reisfeld*, 176 N.Y.S. at 224; *Liepman*, 262 S.W. at 686; *Richard*, 170 N.E. at 535.

80. Compare U.C.C. § 2-105(1) (defining "Goods" as "all things . . . movable at the time of identification to the contract for sale.") with *Reisfeld*, 176 N.Y.S. at 224 (noting "that the rubles were bought for resale") and *Liepman*, 262 S.W. at 686 (because of the war with Germany, the marks were intended to be a commodity) and *Richard*, 170 N.E. at 535 (buyer intended to resell the lei in the U.S.).

obtains a credit of 120 million yen does not prohibit it from withdrawing that credit in physical currency. Presumably, unless a buyer and seller agree otherwise, a buyer of foreign exchange has the right to demand delivery of physical currency in place of a credit. The fact that Citibank elects to keep its yen in the form of a bank balance on deposit instead of physical currency should not affect Citibank's contractual rights and obligations. Citibank's decision is merely one of convenience, economy, and security. It is easier, cheaper, and safer to store 120 million yen electronically than in bills in a Brooklyn warehouse.

More fundamentally, the scope of Article 2 should not depend on whether the buyer converted bank credits to cash. If it did, then form would triumph over substance and form could be manipulated. Citibank could easily "shop" among legal regimes, opting into or out of Article 2, by choosing the form of delivery. Only an agreement with DBS that Citibank would maintain the yen in a specific form would limit Citibank's freedom to manipulate the legal rights and duties of the parties. A much more pragmatic evaluation—whether Article 2 serves the needs of Citibank and DBS—ought to determine the scope of the statute.

### 3. The Drafters' Intention

The exclusionary approach may be inconsistent with the intention of the drafters of the U.C.C. The official comment to section 2-105 clearly suggests that the drafters intended to include the sale of money as a commodity within the scope of the Article.<sup>81</sup> It is not a question of the drafters failing to foresee foreign exchange transactions—the comment evinces this foresight. Rather, the drafters did not anticipate that foreign exchange would occur electronically and that it would appear in computerized bank account records. If they had envisioned these developments, then they might have incorporated a definition of "things in action" to avoid confusion as to scope.

More generally, aggressively excluding foreign exchange transactions reflects an intransigence that is inconsistent with the drafters' goal of creating a workable and adaptable statute. They wanted the statute to be interpreted flexibly and liberally.<sup>82</sup> Only then could it be adapted to new commercial contexts like the currency bazaar.

### 4. Underlying Principles

The exclusionary approach may be inimical to the underlying principles of the U.C.C.: simplification,<sup>83</sup> modernization,<sup>84</sup> uniformity,<sup>85</sup> cer-

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81. See, e.g., New York U.C.C. § 2-105, Practice Commentary, at 94-95 (McKinney 1964); § 2-105, New York Annotations, at 97 (McKinney 1964). *But see id.* § 2-201, New York Annotations, note (1)(a) at 119-20 (McKinney 1964) (stating that the original version of the Uniform Sales Act governed contracts for choses in action but later the Act was amended to exclude choses in action).

82. See U.C.C. § 1-102 cmt. 1; *infra* notes 98-105 and accompanying text.

83. U.C.C. § 1-102(2)(a).

84. *Id.*

85. *Id.* § 1-102(2)(c).

tainty,<sup>86</sup> and support for commercial transactions.<sup>87</sup> If foreign exchange transactions are wholly excluded from Article 2, then they become subject to non-uniform, obsolete legal regimes, namely, pre-U.C.C. common law or non-U.C.C. sales statutes.<sup>88</sup> Yet, pre-existing sales law was simplified and modernized by Article 2,<sup>89</sup> and Article 2 unified the sales law of various states.<sup>90</sup> Potentially applying the sales laws of fifty different states renders the law of sales as it pertains to foreign exchange transactions more complex, arcane, and disjointed.<sup>91</sup>

This possibility generates uncertainty for foreign exchange market participants. Providing a precise and predictable legal framework that enhances certainty for businesspersons is a founding principle of Article 2.<sup>92</sup> Taking foreign exchange transactions out of this framework obviously contradicts this principle. Uncertainty is further exacerbated if courts, seeking to keep a foreign exchange transaction within Article 2, manipulate facts to make foreign exchange more closely resemble a paradigmatic good.

The drafters of Article 2 sought a sales statute that would foster commercial development.<sup>93</sup> Tossing foreign exchange transactions to the vagaries of non-U.C.C. law may inhibit innovation in the foreign exchange market.<sup>94</sup> For example, market participants like Citibank and DBS may face difficulty devising a uniform practice of confirming transactions electronically because many different statutes of frauds potentially apply. The need to protect ongoing commercial relations is concomitant with the

86. While certainty is not expressly mentioned in U.C.C. § 1-102, the principles set forth in that section imply increased certainty as to legal rights and obligations. It has been argued, however, that simplification and clarification are fallacious principles, *see, e.g.*, Charles E. Clark, *The Restatement of Contracts*, 42 YALE L.J. 643, 653 (1933), and costly to achieve. *See, e.g.*, James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 156-7 (1981).

87. U.C.C. § 1-102(2)(b).

88. An analogous problem exists for hybrid sales-service contracts and (to a lesser extent given the enactment of Article 2A) lease contracts. An example of a non-U.C.C. sales statute is New York's General Obligations Law. *See infra* note 108.

A tension may exist between providing certainty and predictability for commercial parties through codification, on the one hand, and stifling innovation in a market as a result of codification, on the other hand. The difficult, time-consuming nature of revising a code—as the current experience with Article 2 illustrates—reinforces concerns about inhibiting the expansion of new commercial practices. *See* Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405 (1994).

89. For a discussion of the need to simplify and update sales law, see Arthur L. Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 834-5 (1950); Karl Llewellyn, *The General Scope of the Uniform Commercial Code*, 1950 N.J. ST. B.A.Y.B. 73, 75.

90. For a discussion of the importance of unifying sales law, see Llewellyn, *supra* note 89, at 73.

91. *See, e.g.*, Murray, *supra* note 68, at 456 (discussing wide variations in non-U.C.C. standards among states).

92. *E.g.*, In re Automated Bookbinding Serv. Inc., 471 F.2d 546, 552 (4th Cir. 1972).

93. *See, e.g.*, Llewellyn, *supra* note 89, at 73.

94. For a discussion of how the solar energy industry was harmed by the denial of the application of the implied warranties of Article 2 to the sale and installation of solar energy devices, see Harry R. Wright, Jr., Comment, *The Sales-Service Dichotomy: A Roadblock to Consumer Acceptance of Domestic Solar Energy Devices*, 30 MERCER L. REV. 547, 552-54 (1979).

need to support commercial development.<sup>95</sup> Currency bazaar participants like Citibank and DBS are repeat players—they are well known to each other and deal with one another on a daily basis. Application of Article 2 may place these relations, particularly with respect to matters of contract formation, on a firm legal foundation.<sup>96</sup>

### C. *The Pragmatic Strategy*

Official comment 1 to section 1-102 aims to prevent U.C.C. Article 2 from aging while maintaining its strength as a foundation for commercial parties:

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.<sup>97</sup>

The drafters knew subsequent generations of lawyers would face new transactional horizons. They realized Article 2 would be discarded if it failed to satisfy the needs of the parties.<sup>98</sup> Thus, they drafted Article 2 so it could adapt to a variety of contractual contexts that were not overtly contemplated by the drafters.<sup>99</sup> The statute's style is deliberately "loose" and "open-ended."<sup>100</sup> Many of its provisions articulate standards of contract law and principles of justice rather than specific, technical rules.<sup>101</sup>

Neither the carelessly inclusive approach of the *United Equities*, *Saboundjian*, *Intershoe*, *IBJ*, and *Koreag* courts, nor the aggressively exclusive approach of the Federal Reserve, heeds the advice of the drafters. The first approach lacks articulated standards and reasoning. The second approach is rigid. Both approaches neglect new ways of conducting business and the realistic needs of businesspersons. A new pragmatic strategy is

95. See Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 230 (1966).

96. One practical mechanism that repeat players can use to avoid a statute of frauds problem is to waive the statute of frauds defense in a model or master agreement. Strangely, the IFEMA contains no such waiver. See generally, IFEMA, *supra* note 14. If it had the waiver, then the problem would be acute only for non-repeat players, i.e., non-parties to the IFEMA.

97. U.C.C. § 1-102 cmt. 1.

98. Indeed, "[t]he origins of the Uniform Commercial Code lie in the law merchant, a specialized body of usages, or customs, that governed contracts dealing with commercial matters until the seventeenth century." 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.9, at 34 (1990). The rules laid down in the U.C.C. can be viewed as a reflection of what the drafters thought was the best market practice of merchants. Not surprisingly, therefore, a number of provisions of Article 2 impose higher standards on merchants than on other sorts of parties. *Id.* § 1.10, at 42-43.

99. See William D. Hawkland, *Uniform Commercial 'Code' Methodology*, 1962 U. ILL. L.F. 291, 314 (1962); Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951); see also Farnsworth, *supra* note 98, § 1.10, at 40-41 (discussing the adaptability of a general body of contract law to many different types of transactions).

100. Grant G. Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962); see also Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 328.

101. Note, *Disengaging Sales Law from the Sale Construct: A Proposal to Extend the Scope of Article 2 of the UCC*, 96 HARV. L. REV. 470, 484 (1982).



needed to decide whether foreign exchange fits the definition of "goods" and, accordingly, whether foreign exchange transactions are subject to Article 2. This model gains support from Article 2's invitation to courts and commentators to consider the needs of commercial parties by expanding the scope of the statute accordingly.<sup>102</sup>

Under the pragmatic strategy, the determining factor is whether Article 2 furnishes rules that meet the needs of participants in the currency bazaar. Insofar as Article 2 serves these needs, it retains its vitality in new transactional settings. In turn, it promotes certainty in foreign exchange dealings and the development of the foreign exchange market. Article 2 should be tailored to avoid the undesirable repercussions of applying the statute of frauds to foreign exchange transactions. Such a revision would follow the pragmatism countenanced by the drafters of the official comment quoted above.<sup>103</sup>

The *sine qua non* of the pragmatic strategy is the acknowledgment that foreign exchange trading is inherently fraught with uncertainties and risks. For example, Citibank buys yen and sells dollars because it expects yen to appreciate relative to the dollar. There is currency risk—yen could depreciate and Citibank could lose money on the transaction. Rules of sales law, such as the statute of frauds, potentially exacerbate the uncertainties and risks associated with foreign exchange trading. Uncertainties and risks should be minimized.

Put another way, problems that Citibank and DBS might incur in their dollar-yen deal should be resolved efficiently. Efficiency in the context of the foreign exchange market is a two-dimensional concept involving certainty and cost. Market participants need unambiguous rules setting forth whether foreign exchange contract obligations are enforceable. The rules should not impose unnecessary transaction costs on the participants. In sum, rules of contract enforceability that enhance certainty and reduce cost should be the legal cornerstone for wealth-generating foreign exchange transactions.<sup>104</sup> To the extent sales law does not serve as this cornerstone, it should be changed.

It is beyond the scope of this article to examine every provision of Article 2 from this pragmatic perspective in order to decide conclusively whether the statute ought to govern foreign exchange transactions. The

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102. A feature of the pragmatic strategy is that it is designed for cases where it is arguable whether a transaction should be included within the scope of Article 2. Because real estate transactions, for example, clearly are excluded, the strategy is inapplicable. But how close is close enough? There is no attempt herein to set forth criteria as to how persuasive the arguments must be for and against inclusion in Article 2 before the pragmatic strategy should be used.

103. See U.C.C. § 1-102 cmt. 1.

104. Another important goal, appropriate risk-allocation, should be noted. The risks that the rules address should be allocated between two banks engaged in a foreign exchange transaction according to a "better position" criterion—the bank that can most cheaply insure against the loss should bear the risk in question. With respect to the statute of frauds, the risk that a contract is unenforceable is evenly distributed. Similarly, if the proposals discussed below regarding the statute of frauds are implemented, this risk would be evenly distributed.

pragmatic strategy, however, can yield a tentative resolution to the scope problem within the confines of one article. It can be applied to an Article 2 provision of fundamental importance, the statute of frauds. As Professor Farnsworth writes, “[i]t would be difficult to imagine a question more important to a person expecting to make agreements in an unfamiliar legal system than this: when is a writing required to make an agreement enforceable?”<sup>105</sup> Further, the statute of frauds set forth in section 2-201 has caused consternation among foreign exchange market participants. How this section affects the market is an important piece in the puzzle of the scope of Article 2.

#### IV. ENFORCEABILITY—DOES THE STATUTE OF FRAUDS SERVE MARKET NEEDS?

*Had the statute of frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing, frauds.*<sup>106</sup>

The statute of frauds, set forth in section 2-201(1), states:

[e]xcept as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some *writing* sufficient to indicate that a contract for sale has been made between the parties and *signed* by the party against whom enforcement is sought or by his authorized agent or broker.<sup>107</sup>

105. 2 FARNSWORTH, *supra* note 98, § 6.1.

106. 1 WILLIAM BLACKSTONE, COMMENTARIES 601 (1844) (quoting Justice Wilmot's concurrence in *Simon v. Metivier*); Robert L. Misner, *Tape Recordings, Business Transactions Via Telephone, and the Statute of Frauds*, 61 IOWA L. REV. 941, 942 (1976).

107. U.C.C. § 2-201(1) (emphasis added). Because of the tense used in § 2-201 (namely, the words “has been made”) it is evident that the statute of frauds does not require that a contract be in writing; it can be oral. Rather, the statute of frauds requires that a document exist to provide reliable evidence of the existence of the contract. Otherwise it is not enforceable. *See, e.g., Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1182, 1185 (7th Cir. 1991) (Posner, J.). This distinction between contract formation and enforceability is seen in the IFEMA. Section 8.3 of the IFEMA indicates a foreign exchange contract is oral and that the IFEMA is the written evidence thereof. *See IFEMA, supra* note 14.

In attempting to show that a writing sufficient to satisfy the statute of frauds exists, it is impermissible to rely on oral testimony. *See Monetti*, 931 F.2d at 1181; *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 767 n.5 (5th Cir. 1988). The writing, however, need not take the form of a single document. The integration of several documents prepared at different times may satisfy the statute of frauds. *See Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330, 1333 (5th Cir. 1991); *Hunt Oil Co. v. FERC*, 853 F.2d 1226, 1241 (5th Cir. 1988). The writing or writings need not be directed or delivered to the other party, nor do they have to be made for purposes of satisfying the statute of frauds. *See* 2 FARNSWORTH, *supra* note 98, § 6.7, at 406-07.

The statute of frauds applies prospectively as well as retrospectively. For example, it applies to future oral modifications of a contract that originally fell within the statute. Also, if a contract that did not originally fall within the ambit of the statute of frauds is modified, and the modified contract falls within the statute, then the requirements of the statute must be satisfied. U.C.C. § 2-209(3).

Some commentators suggest that the statute of frauds does not cover every transaction that is within the scope of Article 2. *See, e.g.,* 2 FARNSWORTH, *supra* note 98, § 6.6, at 402-03 & n.5. As discussed above, U.C.C. § 2-102 states that Article 2 governs “transactions” in goods. *See supra* note 50 and accompanying text. In contrast, § 2-201(1) quoted above refers to

If section 2-201(1) were applied strictly to the Citibank-DBS dollar-yen spot agreement, then it would be unenforceable.<sup>108</sup> Assuming written confirmations are not exchanged, Citibank and DBS have nothing to sign, and clearly the value of the transaction exceeds \$500. The tape recording of the telephone conversations between the traders does not satisfy the writing requirement of the statute of frauds.<sup>109</sup>

More generally, all of the foreign exchange transactions in which written confirmations are not exchanged are unenforceable if the Article 2 statute of frauds is strictly construed.<sup>110</sup> Immediately, then, it is apparent

"contract[s]" for the sale of goods. This reasoning, however, does not appear to have been widely accepted; hence it seems unlikely that a court would rule that foreign exchange transactions are governed by Article 2 but excluded from the statute of frauds on the basis of the "transaction"/"contract" distinction.

108. Courts sometimes confuse enforceability with validity. *See, e.g.,* *Tri-State Petroleum Corp. v. Saber Energy, Inc.*, 845 F.2d 575, 579 (5th Cir. 1988) (stating that the litigants are not "asserting that any oral contract is invalid because of the statute of frauds"). A contract is not void just because it fails to satisfy the statute of frauds. This failure means that the transaction cannot be "judicially enforced in favor of a party to the contract." U.C.C. § 2-201 cmt. 4; *see also* *Glover School & Office Equip. Co. v. Dave Hall, Inc.*, 372 A.2d 221, 223 (Del. Super. Ct. 1977) (stating "the beginning premise is that an oral contract is valid and enforceable unless prohibited or restricted by some statutory provision [such as the Statute of Frauds]").

This result contrasts with that which would be obtained under § 5-701(a) of New York's General Obligations Law ("G.O.L."), a non-U.C.C. statute of frauds. The G.O.L. is potentially relevant to the global currency bazaar because the U.S. is one of the three largest foreign exchange trading centers in the world. The three countries with the largest average daily turnover of foreign exchange transactions are the United Kingdom (\$300 billion daily), the U.S. (\$192 billion daily), and Japan (\$126 billion daily). Central Bank Survey, *supra* note 3, at 13-14. Undoubtedly, New York accounts for the bulk of the U.S. activity. Section 5-701(a) of the G.O.L. states that a contract is absolutely void "unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such [contract]. . . [b]y its terms is not to be performed within one year from the making thereof." N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney 1989). This statute of frauds would not render a spot foreign exchange contract void because it is performed within two days. (Nor would § 5-701(a) of the G.O.L. render a forward foreign exchange contract void so long as the value date of the contract is within one year. Most forward contracts are completed in less than one year). Hence, there is a potential conflict between U.C.C. § 2-201, which renders a spot contract unenforceable, and G.O.L. § 5-701(a)(1), which does not render it void. Under U.C.C. § 1-103, which states that pre-U.C.C. law is applicable unless displaced by provisions of the U.C.C., § 2-201 prevails. *See* *H & W Indus. v. Formosa Plastics Corp.*, 860 F.2d 172, 180 (5th Cir. 1988). For a discussion of the application of this statute of frauds, see Cathy L. Scarborough, *Foreign Exchange Contracts: What Statute of Frauds Applies in New York?*, 4 INT'L L. PRACTICUM 17, 20-21 (1991).

109. *See infra* notes 117-66 and accompanying text. For a recent discussion of electronic signatures and the requirement of a signed writing, see Sharon F. DiPaolo, Note, *The Application of the Uniform Commercial Code Section 2-201 Statute of Frauds to Electronic Commerce*, 13 J.L. & COM. 143 (1993).

110. Section 2-201 is not the only statute of frauds in the U.C.C. that would render such transactions unenforceable. For example, U.C.C. § 8-319 sets forth a writing requirement for the sale of investment securities. *See infra* note 130. Similarly, U.C.C. § 9-203 establishes a requirement for security agreements.

In the context of foreign exchange transactions, U.C.C. § 1-206 could be relevant. It is a residual, gap-filling provision that covers sales of personal property not otherwise covered by the aforementioned sections. U.C.C. § 1-206(2) & cmt. U.C.C. § 1-206(1) states that a contract for the sale of personal property is unenforceable beyond \$5,000 "unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent."

The official comment to U.C.C. § 1-206 states that two "principal gap[s]" are filled by that section. The first gap relates to the sale of general intangibles as defined in U.C.C. § 9-

that strictly applying section 2-201(1) could wreak destructive havoc in the currency bazaar.<sup>111</sup> This result indicates section 2-201(1) does not serve the needs of market participants: no law should threaten the foundations of an otherwise well-functioning market that is worthy of preservation. This conclusion is reinforced by the application of the pragmatic strategy—specifically, the analyses of the costs, benefits, and purposes of the statute—set forth below.<sup>112</sup> Thus, the model calls for the rejection of Citibank's affirmative defense. The model also suggests DBS's response has merit, namely, that foreign exchange should be excluded from section 2-105(1) and thus from the reach of section 2-201(1). This argument, however, cannot yet be accepted.

#### A. *The Clash of Cultures*

There is an uneasy tension between the technology and business practices of the foreign exchange market on the one hand, and the demands of contract enforceability rules in sales law on the other hand. The technology is telephonic. It expands the ways in which market participants negotiate and execute currency trades. Communications between Citibank, DBS and the like are not face-to-face meetings in which written draft contracts are exchanged and marked up by lawyers representing the

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106. See also 2 FARNSWORTH, *supra* note 98, § 6.6, at 404. As discussed above, foreign exchange can be categorized as a thing in action. See *supra* notes 66-72 and accompanying text; U.C.C. § 9-106. Section 9-106 specifically includes things in action in the definition of "[g]eneral intangibles."

The second gap concerns transactions excluded from Article 9 by U.C.C. § 9-104. Section 9-104(l) of the U.C.C. indicates that Article 9 is inapplicable "to a transfer of an interest in any deposit account." A "deposit account" covers "a demand, time, savings, passbook or like account maintained with a bank." U.C.C. § 9-105(e). Certainly, accounts maintained by Citibank and DBS for foreign exchange trading purposes would be "deposit accounts" excluded from Article 9.

Consequently, contracts for foreign exchange could fall into either or both of the gaps and thereby come within the ambit of § 1-206. This result is obtained only if foreign exchange is a thing in action and not a good governed by Article 2 and its statute of frauds.

Such a result would not affect the analysis in this article. The same concerns about the costs, benefits, and purposes of the statute of frauds are relevant to U.C.C. § 2-201 or § 1-206. Indeed, because U.C.C. § 2-201 requires that a writing contain only a quantity term, while § 1-206 requires more, the arguments below apply to U.C.C. § 1-206 a fortiori. Compare U.C.C. § 2-201 cmt. 1 with U.C.C. § 1-206(1). See generally Note, *The Uniform Commercial Code, Section 1-206—A New Departure in the Statute of Frauds?*, 70 YALE L.J. 603 (1961) (comparing the requirements of § 1-206 and § 2-201).

111. This unhappy scenario has spurred legislative action in New York. Recently, the New York legislature passed an amendment to G.O.L. § 5-701 that excludes "qualified financial contracts" from the statute of frauds. Act of July 20, 1994, ch. 467, sec. 1, § 5-701(b), 1994 N.Y. LAWS 467 (codified as amended at N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1994)). Such contracts include spot and forward foreign exchange contracts and currency swaps. The bill was transmitted to Governor Mario Cuomo for his signature on July 8, 1994. N.Y.A 11513, 215th G.A., 2d Sess. (1994). Similar amendments are proposed in the bill for §§ 1-206 and 2-201, which raises the specter of non-uniformity in New York's U.C.C. vis-a-vis the U.C.C. of other states. The bill is actively supported by the ISDA, a trade association representing participants in the over-the-counter derivatives markets. See Memorandum from Daniel Cunningham and Catherine Struve to ISDA Board of Directors re: Amendment of New York Statute of Frauds (June 2, 1994) (on file with author). The ISDA memo is accompanied by a form letter favoring the amendments that ISDA members are encouraged to send to New York legislators.

112. See *infra* notes 167-216 and accompanying text.

parties during endless rounds of coffee and take-out sandwiches. The trading floors of Citibank and DBS are entirely different from the conventional lawyers' conference room; traders often communicate by telephone. In sum, the deals made in the currency bazaar are oral and are concluded rapidly and informally.<sup>113</sup>

The statute of frauds must adapt to this telephonic technology. England accepted a similar proposition many years ago. In 1954, the English Law Reform Committee successfully advocated the repeal of the statute of frauds, in part because a writing requirement is "out of accord with the way in which business is normally done."<sup>114</sup> Unfortunately, this proposition has not gained respectability in the U.S. Except for the current noteworthy attempt at revising U.C.C. Article 2, "[t]here has been no serious movement to abolish the statutes of frauds in this country, though they have had many critics."<sup>115</sup> Foreign exchange market participants might not reduce their agreements to writing for good reason. Because bid-ask spreads are thin for trading in liquid currencies, profits are made through a high volume of trading. To maximize profits, market participants seek to conclude as many transactions as cheaply and quickly as possible. Outdated legal formalities like the statute of frauds requirements lead to higher transaction costs and delay the completion of transactions. Not surprisingly, many market participants prefer tape recordings of conversations among traders instead of written agreements.

The law also must account for the culture of the currency bazaar. Trust among participants in the foreign exchange market is high. Perhaps this aspect of business culture also distinguishes the trading floor from the conference room. The participants repeatedly deal with one another. To engage in fraudulent or deceptive practices is to invite ostracism: a trader's unctuous behavior quickly becomes widely known and other traders decide it is risky and imprudent to deal with the rogue trader. In 1966, an author of a textbook on foreign exchange observed that "[m]ost dealers with very long experience have never had a single lawsuit arising from misunderstandings in respect of foreign exchange transactions."<sup>116</sup> The observation remains true today.

Two variations of the hypothetical spot transaction presented in Part II will illustrate that the statute of frauds should be reformed or abolished in the context of the foreign exchange market. In Case One, the telephone conversation between the Citibank and DBS traders is taped. However, no written confirmations are exchanged between the parties. Case

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113. Undoubtedly, these features, and the phenomenon of telephonic and computer-to-computer communications, are found in many other modern markets. Accordingly, the potential applicability of the pragmatic strategy is not limited to the foreign exchange market.

114. 2 FARNSWORTH, *supra* note 98, § 6.1, at 371 (quoting UNITED KINGDOM LAW REVISION COMMITTEE ON THE STATUTE OF FRAUDS AND THE DOCTRINE OF CONSIDERATION, SIXTH INTERIM REPORT, CMD. No. 5449, 6-7 (1937)).

115. 2 FARNSWORTH, *supra* note 98, § 6.1, at 371. Farnsworth is referring specifically to non-U.C.C. statutes of frauds enacted in most states, but his remark is equally true with respect to U.C.C. § 2-201.

116. PAUL EINZIG, A TEXTBOOK ON FOREIGN EXCHANGE 41 (1966).

One raises the problem of compliance with section 2-201(1), the fundamental statute of frauds provision. The problem is solved if section 2-201(1) is judicially reinterpreted or legislatively modified so that tape recordings satisfy the "writing" and "signature" requirements of that section.

In Case Two, the operations departments of Citibank and DBS exchange such confirmations subsequent to the tape-recorded, telephonic conversation between their traders. This Case raises a the problem of compliance with section 2-201(2), the merchant's exception to section 2-201(1). It is argued that the microeconomic costs of such confirmations do not justify the requirement that they be used.

## B. Case One: Tape Recordings as "Writings"

### 1. The Tangibility Paradigm

Twenty years ago Professor Misner argued that tape recordings should satisfy the statute of frauds.<sup>117</sup> His argument, however, is incongruous. He did not advocate that a tape recording be considered a "writing" for purposes of U.C.C. sections 1-201(46) and 2-201. Instead, Misner argued that the recording's voiceprint should satisfy the "signature requirement of U.C.C. section 1-201(39).<sup>118</sup> The real problem with Misner's argument, however, is that it is disappointingly conservative.

Misner's argument is mired in the tangibility paradigm. This paradigm does not consider the needs of a particular market like the currency bazaar. The market must fit the law, not the reverse. Most importantly, this paradigm requires some physically cognizable piece of paper to evidence a contract under the statute of frauds. A "voiceprint"—the graphic output of high-speed sound spectrograph<sup>119</sup>—meets the requirement. Thus, Misner's argument does not strike at the heart of the statute of frauds: it will not allow a tape recording alone to satisfy the statute.

Ironically, in trying to cope with telephone business deals, Misner in effect advocated two writings to satisfy the statute of frauds—the voiceprint (which would be the "signature") combined with a written memorandum (which would be the "writing").<sup>120</sup> This solution is not only needlessly cumbersome and costly, but also inapposite to the special technologies and business practices of the currency bazaar. A more radical and efficient solution is required, whereby the tangibility paradigm is discarded and full legal effect is given to tape recordings.

### 2. Possible Legislative Amendments

One such solution—rejected by Misner with little reasoning<sup>121</sup>— is legislative action. Two straightforward legislative amendments might be appropriate. U.C.C. section 2-201(1) states the "writing" must be "signed"

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117. Misner, *supra* note 106.

118. *Id.* at 942, 945-56, 964.

119. *Id.* at 946.

120. *Id.* at 950.

121. *Id.* at 943-46.

by the party (or her broker) against whom enforcement of the contract is sought. Under section 1-201(46), a "writing" includes a printing, typewriting or any other intentional reduction to tangible form."<sup>122</sup> A legislative amendment is needed to bring tape recordings squarely within the meaning of a "writing." The following phrase could be added at the end of section 1-201(46) to accomplish this goal: "and a tape recording or other recording on magnetic tape."<sup>123</sup>

Under U.C.C. section 1-201(39), "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing." To ensure consistency with the term "writing" as amended, the following phrase could be added at the end of section 1-201(39): "and any statement of a speaker identifying the speaker that is tape-recorded or recorded on magnetic tape."

Amending section 1-201(46) in the manner previously suggested, however, may be incongruous with the structure of U.C.C. Article 3 and other non-Article 3 provisions dealing with negotiable instruments. Rules regarding negotiable instruments are property rules that turn on the physical delivery of a tangible item. Such rules become nonsensical in an intangible world. Accordingly, adjusting section 1-201(46) could do more harm than good.<sup>124</sup> It is wise to consider two other legislative options in lieu of amending sections 1-201(46) and 1-201(39).

One alternative is to add a definition of "record" in section 1-201. Indeed, in April 1994 the American Bar Association's Working Group on Electronic Writings and Notices of the Subcommittee on Electronic Commercial Practices ("Working Group") approved a proposed definition of "record" that would embrace tape recordings: "[r]ecord" means a durable representation of information which is in, or is capable of being retrieved or reproduced in, perceivable form. A record may be in writing or in any electronic or other media."<sup>125</sup> As the Working Group explains:

The term "record" is new. Throughout the Code, numerous provisions of the various Articles have required parties to communicate in "writing" as defined in Section 1-201(46). Given the rapid development of electronic and other communication and storage technologies, the requirement that documents or com-

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122. U.C.C. § 1-201(46). Obviously, a tape recording is not a "printing" or "typewriting." It can be transcribed, but then the transcription and not the tape itself is the writing. Moreover, a key feature common to printing and typewriting is that each is readable by the unaided human eye. This feature is not present with respect to tape recordings. See 1 RONALD A. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 1-201:134 (2d ed. 1970).

123. An alternative proposal may be derived from Professor Anderson's argument that a tape recording is not a "writing" because it "lack[s] the element of being 'readable' by the unaided human eye which is characteristic of printing and typewriting." 1 ANDERSON, *supra* note 122, § 1-201:134. This proposal calls for adding "or on any substance" after the words "tangible form" in § 1-201(46). *Id.* Anderson's argument has been criticized by Misner for citing no authority. See Misner, *supra* note 106, at 947-48.

124. See Patricia B. Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 *LOY. L.A. L. REV.* 607, 612-16, 622-24 (1993).

125. Letter from Patricia B. Fry, Professor of Law and Associate Dean for Academic Affairs, University of North Dakota School of Law, to Raj Bhala, Assistant Professor of Law, Marshall-Wythe School of Law, 5 (June 27, 1994).

munications be "written" or "in writing" no longer reflects existing or developing commercial practices. Examples of current technologies commercially used to communicate or store information include, but are not limited to, magnetic media, optical discs, digital voice messaging systems, audio tapes and photographic media.<sup>126</sup>

With the addition of the term "record" to section 1-201, there should be no need to modify the term "writing." The Working Group's proposal is gaining acceptance among other American Bar Association committees charged with studying the revision of the U.C.C. For example, the term "record" may be used in revisions to U.C.C. Articles 2 and 5.<sup>127</sup>

Another legislative option would be to change the statute of frauds to allow parties to vary it by agreement. While freedom of contract is a foundation of Article 2, Citibank and DBS currently are not permitted to opt out of section 2-201(1).<sup>128</sup> Adding a phrase or sentence to section 2-201(1) that would allow them to vary the statute by agreement would provide the necessary freedom.<sup>129</sup>

### 3. Judicial Re-interpretation

A different way of accomplishing the same task would be for judges to reinterpret sections 1-201(39) and (46) to encompass tape recordings. While this may be a time-consuming and uneven process, there is a textual basis for such judicial action. U.C.C. sections 1-201(39) and (46) contain the word "includes." Because this word does not limit the definition, a court could reasonably extend the definition to include non-paradigmatic writings.

Unfortunately, some courts adhere to the tangibility paradigm. These courts take a formalistic view of tape recordings and, consequently, decide these non-paradigmatic writings do not satisfy the statute of frauds. For example, the issue in *Swink & Co. v. Carroll McEntee & McGinley, Inc.* was whether a tape-recorded oral contract for the sale of securities is enforcea-

126. *Id.*

127. *Id.* at 2.

128. See U.C.C. § 1-102 cmt. 2 ("[T]he statute of frauds found in Section 2-201 . . . does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the 'contract' made unenforceable . . ."); U.C.C. § 1-205 cmt. 4 (referring to the Article 2 statute of frauds as a "mandatory rule . . . whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade").

129. The word "sign" (or "signature," "signatures," "signed," or "signer") appears in U.C.C. §§ 2-205 (the merchant's firm offer rule) and 2-209 (concerning modification, rescission, and waiver). The word "writing" (or "written") appears in U.C.C. §§ 2-202 (the parol evidence rule), 2-203 (providing that seals are inoperative), 2-205, 2-207 (concerning additional terms in an acceptance or confirmation), 2-209, 2-316 (regarding the exclusion or modification of warranties), 2-509 (concerning risk of loss in the absence of a breach of contract), 2-605 (regarding a waiver of a buyer's objections to a delivery of goods), 2-607 (relating to notice of a claim of litigation), and 2-616 (relating to notice of a material or indefinite delay). Modifying the statute of frauds as suggested above, or re-interpreting it as discussed below, is unlikely to upset these other provisions of Article 2. Foreign exchange contracts are between two parties and neither multiple writings nor signatures are involved. Thus, the rights and obligations of third parties would be unaffected by the proposals.



ble under the statute of frauds in Article 8 of the U.C.C.<sup>130</sup> The court assumed that a tape recording is an "intentional reduction to tangible form" and, therefore, a "writing" under section 1-201(46).<sup>131</sup> Nevertheless, the court held that the recording failed to satisfy the statute of frauds because it was not "signed" by the party against whom enforcement of the contract was sought.<sup>132</sup>

The court in *Roos v. Aloi* also refused to re-interpret the statutory language to reflect market practice.<sup>133</sup> Again, the issue was the enforceability of an oral agreement for the sale of stock.<sup>134</sup> The buyer argued the tape recorded conversation of the agreement satisfied the relevant statute of frauds.<sup>135</sup> The court rejected this argument in a highly ironic manner.<sup>136</sup> On one hand, the court noted that the parties (two equal shareholders in a closely-held corporation) were well known to each other. Consequently, strict adherence to the intricacies and formalities of corporate law was unnecessary.<sup>137</sup> On the other hand, the court slavishly followed a single precedent on the statute of frauds, even though the relationship of the parties and the surrounding facts and circumstances reliably indicated the existence of an enforceable contract.<sup>138</sup>

The facts of the *Swink* and *Roos* cases did not suggest that the tape-recorded voices were not genuine. Perhaps the courts' decisions were based on concerns that a voice on tape is more difficult to authenticate than a handwritten signature. For such courts, reliability is the core of the statute of frauds "signature" requirement. Obviously, contracts should not be enforced if it is uncertain whether the defending party assumed contractual obligations; but it is folly to think that authenticating recorded

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130. 584 S.W.2d 393, 394-96 (Ark. 1979). U.C.C. Article 8, which governs transactions in investment securities, contains a statute of frauds in § 8-319:

[a] contract for the sale of securities is not enforceable by way of action or defense unless:

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker, sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price.

U.C.C. § 8-319. The fact that the statute of frauds at issue is U.C.C. § 8-319 does not render a case inapposite to the analysis of the Citibank-DBS dispute under U.C.C. § 2-201. The critical terms "writing" and "signed" are used in both sections and defined in exactly the same way in U.C.C. §§ 1-201(46) and 1-201(39), respectively. Moreover, U.C.C. § 8-319 cmt. 1 states that "[t]his Section is intended to conform the statute of frauds provisions with regard to securities to the policy of the like provisions in Article 2 (Section 2-201)." Indeed, examining cases arising under U.C.C. § 8-319 for clues about the interpretation of § 2-201 is commonly done. See, e.g., *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 767 n.6 (5th Cir. 1988).

131. *Swink & Co.*, 584 S.W.2d at 398-99.

132. *Id.*

133. 487 N.Y.S.2d 637 (N.Y. App. Div. 1985).

134. *Id.*

135. *Id.* at 640. Those provisions were U.C.C. § 8-319 and New York's General Obligation Law. *Id.* at 642-43; see also *infra* note 130.

136. *Roos*, 487 N.Y.S.2d at 642. See *supra* note 108 for a discussion of the General Obligations Law.

137. *Roos*, 487 N.Y.S.2d at 640.

138. *Id.* at 642-43.

voices is any more difficult than authenticating a signature on paper.<sup>139</sup> Indeed, impersonating a voice is probably far harder than forging a signature; hence, a tape recording may well be more reliable than a signature. Further, the vast majority of foreign exchange transactions, like the agreement in the *Roos* case, involve repeat players whose voices are well-known to each other. Certainly the parties introduce themselves to each other before negotiating a spot foreign exchange deal. Courts that consistently apply the tangibility paradigm, such as the *Swink* and *Roos* courts, never entertain these considerations.

The court in the Citibank-DBS dispute should avoid this paradigm's inherently formalistic approach. Instead, it should follow the opinion rendered in *Ellis Canning Co. v. Bernstein* and hold that the tape-recorded conversations between Citibank and DBS satisfy section 2-201.<sup>140</sup> The facts of *Bernstein* closely resemble the disputed dollar-yen transaction. Bernstein orally agreed to sell the stock in United Packers, a company he owned and operated, to the Ellis Canning Company. Bernstein and the Ellis Canning representatives agreed to record the essential elements of the transaction.<sup>141</sup> After the taped conversation, letters and draft agreements were exchanged between Bernstein and Ellis Canning, though the parties' agreement was not memorialized in a signed writing.<sup>142</sup> Subsequently, a third party offered to buy the United Packers stock at a higher price than Ellis Canning had offered. Bernstein reneged on the deal with Ellis Canning and sold the stock to the third party.<sup>143</sup>

The court rightly rejected Bernstein's affirmative defense that the contract with Ellis Canning was unenforceable under the statute of frauds.<sup>144</sup> It held that the tape recording satisfied the statute of frauds writing requirement because the parties had previously agreed in writing to be bound by the tape recording.<sup>145</sup> The court reasoned that if the parties agreed to bind themselves to a recording of their agreement, then

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139. See, e.g., Misner, *supra* note 106, at 956-63 (discussing the scientific aspects of voiceprints).

140. 348 F. Supp. 1212 (D. Colo. 1972). Professor Misner wrongly rejected the *Bernstein* decision, discussed below, as too liberal and, therefore, unlikely to be followed in different jurisdictions in a uniform manner. Misner, *supra* note 106, at 949-50, 964. A court decision in one jurisdiction that is squarely consistent with the needs of the market and the technological and business culture of that market, and that makes rational economic sense, should be an attractive precedent for courts in other jurisdictions. Of course, possibly the best way to ensure that the *Bernstein* holding is uniformly adopted is to enact it legislatively. Yet, Misner rejected legislative solutions. *Id.* at 945-46.

141. *Bernstein*, 348 F. Supp. at 1215-17.

142. *Id.* at 1217-20. The letters and drafts are analogous to the written confirmations discussed in Case Two below. See *infra* notes 167-215 and accompanying text.

143. *Bernstein*, 348 F. Supp. at 1220.

144. Bernstein unsuccessfully argued that no contract had been formed with Ellis Canning because no meeting of the minds occurred. The court held that all the essential terms of the stock sale were agreed to notwithstanding certain objections to the structure of the transaction raised by Bernstein. *Id.* at 1221, 1225-28.

145. *Id.* at 1228. While the court characterized this decision as a holding, a more conservative interpretation of the case is possible. The court plainly held that the letters and draft contracts exchanged by the parties satisfied the writing requirement of U.C.C. § 8-319. The court stated that it went "a step farther" in deciding that the tape recording, agreed to by the parties, satisfied the statute of frauds. *Id.* This step could be regarded as dicta.

"the contract [was] 'reduced to tangible form' when it [was] placed on the tape."<sup>146</sup> Similarly, the signature requirement was met because its "clear purpose . . . is to require identification of the contracting party and . . . the identity of the oral contractors [was already] established" on tape.<sup>147</sup> Undoubtedly, the court's outrage at Bernstein's behavior compelled this holding. After the taped conversation was concluded, Ellis Canning had provided working capital and management expertise to United Packing. As a result, the financial performance of United Packing markedly improved.<sup>148</sup> Bernstein took advantage of this improvement by selling his stock in United Packing to a higher bidder.

In the hypothetical Citibank-DBS dispute, the court benefits from two additional recent precedents that break away from the tangibility paradigm. In *Londono v. City of Gainesville*, the court held that a tape recording of the city commissioner's action at a public meeting satisfied the signature requirement of the statute of frauds.<sup>149</sup> In *Color & Design Exchange Inc. v. Standish*, the court held that an oral statement made on the record in open court satisfies the statute of frauds.<sup>150</sup> The *Londono* and *Standish* decisions reflect a well-placed confidence in the reliability of tape recordings as evidence of a contract that is lacking in the *Roos* and *Swink* opinions.<sup>151</sup>

#### 4. Certainty

By discarding the tangibility paradigm and enforcing the dollar-yen spot transaction, a court adjudicating the Citibank-DBS dispute ensures that the statute of frauds serves the needs of market participants. One such need is certainty as to the enforceability of spot deals. Knowing that existing obligations will be enforced, sellers of foreign exchange, like DBS, can comfortably reject new offers to buy currency. This certainty is particularly important in the volatile foreign exchange market where new offers are the inevitable result of dramatic, swift changes in rates.

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146. *Id.*

147. *Id.* But see *Swink & Co. v. Carroll McEntee & McGinley, Inc.*, 584 S.W.2d 393 (1979) (holding that a tape recording was a "writing," but the "signature" requirement was not met; hence the contract at issue was unenforceable).

148. *Bernstein*, 348 F. Supp. at 1218.

149. 768 F.2d 1223, 1227-28 n.4 (11th Cir. 1985).

150. 593 A.2d 169, 170 (Conn. Super. Ct. 1991). The statement was not made by the party to be charged, *Standish*, but by the attorney for the plaintiff seeking enforcement of the contract. The contract involved a personal guarantee made by *Standish*, the president of a corporation, for payment of a judgment rendered against his corporation.

151. The Court adjudicating the Citibank-DBS dispute also has the benefit of several precedents establishing a liberal approach to the signature requirement. See, e.g., *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276 (4th Cir. 1987), *cert. denied*, 484 U.S. 823 (1987) (the trademark of a seller satisfied the signature requirement); *Procyon Corp. v. Components Direct, Inc.*, 249 Cal. Rptr. 813 (Cal. Ct. App. 1988) (a buyer signed a letter of credit essentially by adopting the signature of the bank that issued the credit); *Paloukos v. Intermountain Chevrolet Co.*, 588 P.2d 939 (Idaho 1978) (the business name of the seller printed on a worksheet satisfied the signature requirement); *Automotive Spares Corp. v. Archer Bearings Co.*, 382 F. Supp. 513 (N.D. Ill. 1974) (letterhead satisfied the signature requirement); *A&G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207 (Alaska 1976) (typed name was sufficient to satisfy the requirement).

## 5. Fraud Prevention or Fraud Promotion?

A decision in the Citibank-DBS dispute that is consistent with the *Bernstein*, *Londono*, and *Standish* cases serves a second important market need—promoting market integrity and preventing fraud. Like *Bernstein*, Citibank is asking a court to ratify its unscrupulous behavior through the statute of frauds. Notions of fairness and justice dictate that the tape-recorded telephone transaction between Citibank and DBS should be an enforceable contract.<sup>152</sup> Applying the statute of frauds in this case is at best a hinderance to achieving a just result. It gives a party like Citibank a legal basis for welshing.<sup>153</sup>

On the other hand, the statute of frauds was intended to prevent fraudulent claims by thwarting perjured testimony in contract cases and by generally avoiding “the maladies of fraud and deceit.”<sup>154</sup> As Professor Llewellyn stated:

The effort of the Code (2-201) has been to deal with the essential purposes for which the Statute was designed, while getting and keeping away from the abuses: to wit, to make utterly essential some evidence in writing and over signature, or else some pretty good other evidence that rests on something more tangible than words of mouth. . . . [T]he Code adds both the desire and a reasonable machinery for a businessman to be able to rely on what both parties sign and on the fact that he has procured a memo signed by the other party.<sup>155</sup>

Thus, one could argue that circumscribing or abolishing the statute of frauds as an affirmative defense would constrain the ability of a court to render just opinions in egregious cases. Carefully applying the fundamental rules of contract formation, however, is a protective substitute. Suppose that after the DBS trader provides the Citibank trader with a dollar-yen quote, the Citibank trader says she is “strongly interested” in buying 120 million yen and provides delivery instructions to the DBS trader. On the value date, DBS delivers 120 million yen to Citibank, but no reciprocal payment of \$1,153,846.15 is made by Citibank. Assume that after the trade date, the yen depreciated relative to the dollar. Consequently, DBS is anxious to sell its yen at the higher exchange rate that prevailed on the trade

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152. This position assumes that the tape recording meets the two basic requirements set forth in U.C.C. § 2-201 cmt. 1. First, there is “a basis for believing that . . . a real transaction” occurred. Second, the quantity term is set forth.

153. A contract should be enforced, even if the court must resort to the doctrine of promissory estoppel. See *Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1185-86 (7th Cir. 1991) (discussing whether promissory estoppel can be used to avoid limitations on the enforcement of oral promises placed by the statute of frauds); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 771 (5th Cir. 1988) (stating that promissory estoppel should be invoked only when it would be inequitable for the court to apply the statute of frauds).

154. *Misner*, *supra* note 106, at 943; see also *DF Activities Corp. v. Brown*, 851 F.2d 920, 922, 924 (7th Cir. 1988) (Posner, J., plurality and Flaum, J., dissenting respectively); *Holley Equip. Co. v. Credit Alliance Corp.*, 821 F.2d 1531, 1534 (11th Cir. 1987) (citing *Campbell v. Campbell*, 371 So.2d 55, 60 (Ala. Civ. App. 1979)); *Levin v. Knight*, 780 F.2d 786, 787 (9th Cir. 1986).

155. 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-201:01, at 9-10 (1992).

date than at the currently-prevailing rate.<sup>156</sup> Therefore, DBS argues that a dollar-yen contract exists. The statute of frauds allows a court to avoid enforcing the alleged contract.

Yet, a court need not apply the statute of frauds to achieve this result. A court can reason that the offer-acceptance process was not completed. The statement of "interest," even when coupled with the provision of delivery instructions, is not an acceptance of DBS's offer to sell yen. Ostensibly, such reasoning is a doctrinal sleight-of-hand, that is, using contract formation rules to deal with enforceability problems. Any theoretical distinction between formation and enforceability, however, is of no practical moment to the Citibank trader. Whether a court decides that no valid contract ever was formed or that a contract exists but is unenforceable, the result is the same—Citibank has no obligation to buy 120 million yen.<sup>157</sup>

As the Citibank-DBS example illustrates, the statute of frauds can defeat its own purpose.<sup>158</sup> In effect, the statute of frauds is lop-sided. It is designed in part to prevent the fraudulent assertion of contractual claims, yet it allows a party to renege on a deal when an agreed price subsequently becomes unprofitable because of subsequent market developments. English law reformers have acknowledged this lop-sidedness. As Justice Wilmot's opinion (quoted at the outset of this Part) suggests, English jurists had complained for many years that the statute promotes fraud. The English Law Reform Committee finally agreed:

"The Act," [the Statute of Frauds] in the words of Lord Campbell . . . "promotes more fraud than it prevents." True, it shuts out perjury; but it also and more frequently shuts out the truth. It strikes unpartially at the perjurer and at the honest man who has omitted a precaution, sealing the lips of both. Mr. Justice Fitzjames Stephen . . . went so far as to assert that "in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality."<sup>159</sup>

In 1954, almost three centuries after it first enacted the statute of frauds, Parliament repealed the statute.<sup>160</sup>

156. DBS might cite U.C.C. § 2-204 in its favor, claiming sufficient appropriate conduct thereunder by Citibank to establish an agreement.

157. The statute of frauds is unnecessary to prevent injustices in other types of cases. Suppose a wrongdoer claiming she is a Citibank trader telephones a DBS trader and asks for a dollar-yen quote. The DBS trader provides the quote, and the wrongdoer says "mine, 120 million yen," thereby indicating a purchase of yen for dollars from DBS. The statute of frauds is a means for a court to ensure that the alleged contract is not enforced against Citibank. Citibank can argue, however, that under applicable agency law principles the wrongdoer lacked authority to bind Citibank to an enforceable agreement.

158. See *supra* note 31 and accompanying text.

159. UNITED KINGDOM LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, CMD. NO. 5449, 9 (1937), quoted in Misner, *supra* note 106, at 942-43; see also E. ALLAN FARNSWORTH, CONTRACTS § 6.1, at 371-72 (1982).

160. FARNSWORTH, *supra* note 159, at 370-71; see also C. Grunfeld *Law Reform (Enforcement of Contracts) Act, 1954*, 17 MOD. L. REV. 451 (1954). For discussions of the history of the English statute of frauds pertaining to the sale of goods, see Thomson Printing Machinery Co. v. B.F. Goodrich Co., 714 F.2d 744 (7th Cir. 1983); Hugh E. Willis, *The Statute of Frauds—A Legal Anachronism*, 3 Ind. L.J. 427, 429-32 (1928); George P. Costigan, *The Date and Author-*

## 6. Results-Oriented Jurisprudence

Admittedly, rejecting the tangibility paradigm and applying the pragmatic strategy may amount to results-oriented jurisprudence inconsistent with the aims of the drafters of U.C.C. Article 2. After all, it would be incorrect to say the drafters intended the statute of frauds to be satisfied by a tape recording. The official commentary to section 2-201, as well as related definitional provisions in section 1-201(39) and 1-201(46), indicate that the drafters took a paradigmatic pencil-and-paper approach.<sup>161</sup>

This objection, however, must be answered using two fundamental aims of the drafters. First, the U.C.C. should be interpreted flexibly in order to promote commercial development. Second, the freedom of parties to contract with one another in a manner they find efficient should not be abridged.<sup>162</sup> The proposed legislative modifications and judicial re-interpretations call for Article 2 and the relevant definitions in Article 1 to be changed in the light of technology and culture in the currency bazaar. If legislatures adopt these changes, then the pragmatic justification for the inclusion of foreign exchange transactions in Article 2 is strengthened. Surely the drafters would prefer to see their sales law "work" for this market through some modest, constructive tinkering rather than wholly exempting the market from the law.

Judge Posner—hardly an exponent of judicial activism—provided an illustration of useful tinkering consistent with the drafters' fundamental aims. In *Monetti, S.P.A. v. Anchor Hocking Corporation*,<sup>163</sup> he confronted the issue of whether a memo that precedes the actual formation of a contract constitutes a writing which satisfies section 2-201. Posner overcame the perfect tense contained in the statutory language, which says the writing must be sufficient to show that a contract "has been" made. The plain meaning is obvious: contract first, writing second. Nevertheless, Posner held that a pre-contractual writing that indicates acceptance of all the essential terms of an offer satisfies section 2-201(1).<sup>164</sup> Posner reasoned that a rule of strict temporal priority is unnecessary where one party unilaterally performs its obligations under the alleged contract. The plaintiff who sought to enforce the contract had conveyed all of its inventory, records, and other assets to the defendant who invoked the statute of frauds. This unilateral performance is unthinkable unless a contract exists.

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*ship of the Statute of Frauds*, 26 HARV. L. REV. 329 (1913); Crawford Henning, *The Original Drafts of the Statute of Frauds and Their Authors*, 61 U. PA. L. REV. 283 (1913); Justice Stephen & Frederick Pollack, *Section Seventeen of the Statute of Frauds*, 1 LAW. Q. REV. 1 (1885).

161. U.C.C. §§ 2-201, 1-201(39), 1-201(46). U.C.C. § 2-201 cmt. 1 states:

The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad.

This comment also indicates the drafters' aim to minimize the number of terms a "writing" must contain. See also *Bazak Int'l Corp. v. Mast Industries, Inc.*, 538 N.Y.S.2d 503, 508 (1989); 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1954, at 117-18 (1954) (memorandum by K.N. Llewellyn).

162. See U.C.C. § 1-102(3) & cmt. 2; 1 HAWKLAND, *supra* note 155, § 1-102:12 (1984).

163. 931 F.2d 1178, 1182 (7th Cir. 1991).

164. *Id.* at 1182, 1185.

Posner's flexible approach to the language of section 2-201 is applicable to a tape-recorded spot foreign-exchange trade that lacks any evidentiary writing. The partial performance exception to the statute of frauds, set forth in U.C.C. section 2-201(3)(c), reinforces such an approach.<sup>165</sup> That exception states that a contract that fails to satisfy section 2-201(1) "but which is valid in other respects is enforceable . . . with respect to goods for which payment has been made and accepted or which have been received and accepted."<sup>166</sup> Suppose DBS delivers 120 million yen to Citibank on the value date whereas Citibank fails to deliver \$1,153,846.15. Without a contract, DBS would not deliver the yen, just as the plaintiff in *Monetti* would not have turned over its entire business to the defendant without a pre-existing (albeit oral) contract. Accordingly, a formalistic interpretation of the writing requirement in the statute of frauds would be unwarranted. The only reasonable inference from the facts is that a contract exists and should be enforced. In sum, Posner-like tinkering is justifiable in contexts where the facts, and the basic aims of the drafters, demand enforcement of an oral contract.

### C. Case Two: The Costs and Benefits of Confirmations

#### 1. The Tangibility Paradigm Again

Case Two is a paradigmatic situation envisioned by section 2-201(2): a deal made orally, evidenced by a subsequent confirmation slip.<sup>167</sup> Because the confirmations are unsigned or transmitted electronically, they do not comply with the requirements of U.C.C. section 2-201(1). However, the merchant's exception of section 2-201(2) provides that:

[b]etween merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.<sup>168</sup>

Strictly speaking, this provision is not an "exception" to the statute of frauds but rather "an alternate method of satisfying the writing requirement" of section 2-201(1) that is available for merchants.<sup>169</sup>

165. Curiously, Posner does not discuss this exception in detail in the *Monetti* opinion.

166. U.C.C. § 2-201(3)(c). A three-pronged definition of "acceptance" is set forth in U.C.C. § 2-606.

167. *Monetti*, 931 F.2d 1178; see also *Mid-South Packers, Inc. v. Shoney's Inc.*, 761 F.2d 1117 (5th Cir. 1985) (involving an oral offer to sell followed by a written invoice). The non-paradigmatic situation is the reverse: a writing is prepared before the actual formation of the contract. See *supra* notes 163-66 and accompanying text.

168. U.C.C. § 2-201(2).

169. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330, 1334 (5th Cir. 1991). Accordingly, some commentators provide a misleading explanation of U.C.C. § 2-201(2). See, e.g., Scarborough, *supra* note 108, at 20.

A "merchant" is defined in U.C.C. § 2-104(1) as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employ-

Accordingly, one way of satisfying the statute of frauds is to require a written confirmation between parties like Citibank and DBS.<sup>170</sup> Case Two, then, involves the exchange of written confirmations between dealing banks after the banks' traders conclude their recorded telephonic communication. The confirmations identify the currencies involved, the buyer and seller of the currencies, the exchange rate between the currencies, the amount of currencies to be delivered, and the value date. A cost-benefit analysis of the exchange of confirmations pursuant to the statute of frauds indicates that requiring this exchange does not serve the needs of the market.

Llewellyn envisioned parties like Citibank and DBS making contracts by telephone:

These days we are making contracts over the long-distance telephone as an increasingly standard practice. Decent businessmen having made a contract over the long-distance telephone confirm before five o'clock or close of business that day. As the statute now stands, any crook who wishes to play it both ways against the middle has only to fail to communicate [i.e., to answer the counterparty] and the other guy is stuck. He can hold him or get out according to the market.

This happy opportunity for fraud is unfortunately being indulged in to a considerable extent.

We think that the machinery provided in the section [section 2-201(2)], not by any means wholly satisfactory, at least is a safeguard against this particular type of abuse and fits the practice of constantly closing deals at a distance, and orally.<sup>171</sup>

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ment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Surely, Citibank and DBS are merchants because they deal in currency, satisfy the "knowledge or skill" test, or meet the attribution test.

There is no bright-line test for what constitutes a "reasonable time." It "depends on the nature, purpose and circumstances" of the action that is required. U.C.C. § 1-204(2). Because of the short-term volatility of exchange rates, a "reasonable time" may be a shorter period in the context of the currency bazaar than in other markets. *See, e.g., Lish v. Compton*, 547 P.2d 223, 227 (Utah 1976) (holding that twelve days was not a "reasonable time" with respect to the wheat market in which prices fluctuated rapidly).

The correct approach to U.C.C. § 2-201(2) appears to be that it is an exception to the signature requirement, not the writing requirement. U.C.C. § 2-201(2) states that a writing must be "sufficient against the sender." This phrase implies that while a written confirmation is required, the signature of the recipient on the confirmation is not needed. To enforce a contract, the sender of a confirmation must produce that confirmation and must have signed it; but the sender need not also show that the recipient signed the confirmation. In other words, to deprive the confirmation recipient of the statute of frauds defense, the confirmation need only be signed by the sender and indicate the existence of a contract. If the recipient receives the confirmation and does not make a timely objection to it, the recipient loses the statute of frauds defense. Therefore, U.C.C. § 2-201(2) excuses the need for the recipient of a confirmation to sign the confirmation.

170. *See, e.g., Lambert Corp. v. Evans*, 575 F.2d 132 (7th Cir. 1978) (holding that written confirmation of an oral telephone contract satisfied § 2-201). *See generally* FARNSWORTH, *supra* note 159, § 6.7, at 405 (1982) (stating that "the usual way to satisfy the statute [of frauds] is still by a signed writing, commonly called a 'memorandum'").

171. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM'N FOR 1954 179.



But, like Misner, Llewellyn could not overcome the tangibility paradigm. In fact, Llewellyn successfully advocated the adoption of section 2-201 (2). Yet, contrary to Llewellyn's view, there is nothing indecent about concluding a deal by telephone without exchanging written confirmations.

Llewellyn and Misner are not alone in defending the tangibility paradigm. The leading advocate of the use of written confirmations, as well as the exclusion of foreign exchange transactions from U.C.C. Article 2, is the Federal Reserve. Acting through the Foreign Exchange Committee ("FEC")—an informal advisory group of roughly thirty U.S. and foreign commercial and investment banks and foreign exchange brokers—the Federal Reserve repeatedly encourages market participants to exchange written confirmations.<sup>172</sup> The FEC "believes that the practice of confirming trades by personnel other than traders is the best protection against misdirected trades, payments problems, and other potentially costly mistakes as well as a deterrent to unauthorized dealing."<sup>173</sup>

In spite of the doubt cast below on written confirmations, the FEC continues to advocate the exchange of confirmations.<sup>174</sup> A possible explanation for this intransigence is the regulatory influence of the Federal Reserve on the FEC. The Federal Reserve is responsible for supervising many of the commercial banks (and their holding companies) that participate

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172. See, e.g., FEC 1992, *supra* note 14, at 9; FOREIGN EXCHANGE COMMITTEE, 1990 ANNUAL REPORT 5 (1991) [hereinafter FEC 1990]; FOREIGN EXCHANGE COMMITTEE, 1989 ANNUAL REPORT 9 (1990) [hereinafter FEC 1989].

173. FEC 1990, *supra* note 172, at 5. Accordingly, the IFEMA, which was drafted by the Financial Market Lawyers Group of the FEC, states that foreign exchange transactions governed by the IFEMA "shall be promptly confirmed by the Parties by Confirmations exchanged by mail, telex, facsimile or other electronic means." IFEMA, *supra* note 14, § 2.3. Section 8.15 of the IFEMA, allows parties to agree on a specific timing for the exchange, checking, and challenge of confirmations. Absent manifest error, confirmations are deemed correct three business days after receipt by a party. An example of manifest error would be where there is a conflict between the confirmation and a tape recording of the conversation between traders. See IFEMA GUIDE, *supra* note 14, § III.C, at 7. Under § 8.3 of the IFEMA, a tape recording is the preferred evidence of the terms of a transaction. The definition of "Confirmation" in § 1 of the IFEMA lists the elements that should be included in the document. But, no sample confirmation form is appended to the IFEMA because no single format is accepted in the foreign exchange market as a standard. IFEMA GUIDE, *supra* note 14, § III.C, at 8. Breach of the obligation to send a confirmation, however, carries no penalty; failure to exchange confirmations "shall not prejudice or invalidate" any foreign exchange transaction. *Id.*

174. See *infra* notes 176-216 and accompanying text. As the FEC recently reaffirmed: Nevertheless, the [Foreign Exchange] Committee felt strongly that *written* confirmations were still necessary and that tapes did not provide a sufficiently secure and continuous alternative record. . . . [I]n [a] . . . letter to foreign exchange market participants responding to the CIB proposal . . . , the Committee emphasized that it is as necessary as ever to have timely, written confirmations for all spot deals with banks and other dealers. FEC 1990 *supra* note 172, at 5-6.

The only modification to this position concerns the means of transmitting confirmations. The Federal Reserve now acknowledges that transmitting confirmations in a timely manner, namely, electronically, by telex, or fax, is preferable to sending them in the mail. FEC 1990, *supra* note 172, at 6, 29; see also FEC 1992, *supra* note 14, at 9. Electronic transmission occurs through one of two linkages among trading banks: the Society for Worldwide Interbank Financial Telecommunications (SWIFT) system or a direct-dealing system. While such transmissions would entail a transaction cost, at least they would be available before the value date of a spot transaction.

in the foreign exchange market.<sup>175</sup> The Federal Reserve may suspect that the foreign exchange market is plagued by questionable and possibly illegal trading practices that threaten the safety and soundness of the participants it supervises. Written confirmations provide the Federal Reserve with an "audit trail," that is, potential evidence of improper practices. Determined wrongdoers, however, will not hesitate to falsify records. Hence, the practical value of written confirmations for Federal regulators and law enforcement agencies is limited. Tape recordings of traders' and brokers' conversations are themselves audit trails.

## 2. Delays and Costs

Exchanging confirmations is by no means a universal practice in the foreign exchange market. Many market participants find it time-consuming and costly. Traders seek to conclude their transactions quickly. It is infeasible to require traders to spend much time confirming their trades. After concluding one deal over the phone, their attention turns immediately to the next deal. Not surprisingly, the task of confirming—if it is performed—is left to the trading bank's operations department. The main point, however, is that the merchants exception provides little help to traders. In effect, the statute of frauds "interfere[s] with expeditious contracting by delaying mutual obligation from legally attaching until some later time."<sup>176</sup>

In addition to these delays, exchanging confirmations entails preparatory, transmission, and storage costs. Preparatory costs are those connected with the preparation of the confirmation. The officials in the operations department of Citibank and DBS must ascertain the terms of the trade (e.g., the currencies involved, exchange rates, value date, and delivery instructions) by listening to the tape recorded conversations of the traders, talking with the traders, and checking any written records like trade tickets. The officials must be paid for their time and effort. Sending the prepared confirmation via mail, telex, or fax entails a transmission cost. While this cost may be small for a single confirmation, the fact that Citibank and DBS enter into hundreds of deals every day means that the cumulative transmission cost could be significant. Finally, cautious market participants may seek to store confirmations for the statute of limitations period. Under U.C.C. section 2-725(1), the statute of limitations for an action involving a contract for sale is four years from the date the claim accrues. Either the writings must be stored in a warehouse, leading to inventory and property costs, or converted to microfiche, resulting in storage costs. The sum of preparatory, transmission, and storage costs is a sizeable transaction cost connected with every foreign exchange trade.<sup>177</sup>

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175. Under the Bank Holding Company Act, the Federal Reserve has supervisory authority over all bank holding companies. 12 U.S.C. § 1841 (1988). It is also responsible for supervising commercial banks that are state-chartered and members of the Federal Reserve System. 12 U.S.C. § 1813(q) (1988) (defining "appropriate Federal banking agency").

176. Misner, *supra* note 106, at 945.

177. As the FEC admits:

Curiously, in *Monetti*, Judge Posner observed that one purpose of the statute of frauds is "to make the contractual process cheaper and more certain by encouraging the parties to contracts to memorialize their agreement."<sup>178</sup> Posner, however, failed to elaborate on this purpose. It could be that compliance with the statute of frauds leads to less litigation and, thus, greater certainty and lower legal costs.<sup>179</sup> Here, the statute of frauds acts in tandem with the parol evidence rule set forth in U.C.C. section 2-202. By forcing parties to reduce their deal to a writing, the terms thereof will be recorded. Parties will not have to rely on their memories or notes to check the terms. Because such sources are potentially inconsistent, reliance thereon could generate uncertainty. Thus, prudent parties might not only reduce their agreement to writing, but also include a merger clause to ensure their agreement is integrated.<sup>180</sup>

If this logic is what Posner had in mind, then it seems to be undermined by the statute of frauds itself. As discussed below, exactly what a document must contain to be a "writing" and to satisfy section 2-201(1) is unclear.<sup>181</sup> Accordingly, if disputes about the terms of the transaction arise, then surely the parties will rely on the tape recorded conversations of their transaction for guidance.<sup>182</sup> Yet, if the tape is the key evidentiary means for resolving disputed trades, then why bother with a writing in the first place?

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Some banks operate on the assumption that confirmation for a spot trade by a recorded telephone conversation is adequate as long as the contracts settle; they retain written confirmations only for use in the case of a disputed or failed trade. These banks have adopted this procedure in order to *reduce office costs*. They are willing to accept the risk that their more informal confirmation procedures may expose them to a larger number of misdirected spot trades.

FEC 1989, *supra* note 172, at 9 (emphasis added). The FEC's view that reliance on tape recordings exposes banks to greater risk is questioned below.

178. *Monetti*, S.P.A. v. Anchor Hocking Corp., 931 F.2d at 1181.

179. *See, e.g.*, *DF Activities Corp. v. Brown*, 851 F.2d at 925 (Flaum, J., dissenting). Indeed, in *Monetti* Posner cites Professor Farnsworth's treatise in support of the proposition that the statute of frauds "is largely based on distrust of the ability of juries to determine the truth of testimony that there was or was not a contract." *Monetti*, 931 F.2d at 1181 (citing FARNSWORTH, *supra* note 159, § 6.1, at 85 (1990)). The inference that Posner draws from this proposition is that it is more costly, and the outcome less certain, to leave this determination to a jury than to memorialize an agreement in writing. An alternative—and not necessarily inconsistent—inference is that a jury is less competent than the parties (or a judge) to make the determination.

180. This clause (also called an integration clause) is designed to prevent inconsistent sources from undermining the integrity of the agreement because of the parol evidence rule. *See generally* 2 FARNSWORTH, *supra* note 98, § 7.3.

181. *See infra* notes 232-35 and accompanying text.

182. Disputes about representations and warranties are unlikely because the participants are likely to be well-known to each other and to have dealt with each other on several previous occasions. A dispute could arise about the designated account to which the yen are to be delivered. Reference to the tape-recorded conversation of the traders might be fruitless in resolving this dispute. Officials of the operations departments of Citibank and DBS, and not the banks' traders, would be responsible for exchanging delivery instructions. Referral to their oral or written communications would be necessary.

### 3. Practical Irrelevance

There are very few benefits to requiring the exchange of written confirmations that offset the aforementioned delays. The FEC argues that “[c]onfirmations are an important defense against error and fraud.”<sup>183</sup> The comments above regarding fraud promotion rebut this argument.<sup>184</sup> Moreover, the alleged benefit assumes that confirmations are, in fact, exchanged promptly. Suppose Citibank sends a written confirmation to DBS on November 1. DBS, which has reason to know of the contents of the confirmation, fails to respond to the confirmation by November 10. The confirmation would satisfy the writing requirement of section 2-201(1).<sup>185</sup> By failing to answer Citibank’s written confirmation, DBS loses the defense of the statute of frauds, but Citibank must still prove that an oral contract was made prior to the written confirmation.<sup>186</sup>

As a practical matter, however, this result would be irrelevant. The value date of the spot transaction is November 3, and therefore, the dollar and yen legs should settle on that date. Thus, while confirmations exchanged by mail among foreign exchange market participants satisfy section 2-201(2), they rarely, if ever, arrive in time to identify problems before the value date of a spot transaction.<sup>187</sup> Not surprisingly, in 1989 the U.S. Council on International Banking (“CIB”) recommended that banks discontinue the exchange of confirmations by mail because the practice serves no practical purpose.<sup>188</sup>

The only way to detect an error before November 3 would be to check the tape recording of the traders’ oral agreement or to exchange confirmations electronically, by telex, or by fax on November 1 or 2. Again, written confirmations transmitted by these swift means are unnecessary where tape recordings of that transaction exist. The CIB’s recommendation correctly pointed out that taped telephone conversations are a more efficient method of detecting problems with a trade.<sup>189</sup> They are immediately available for use by the operations departments.

### 4. Helping the Sophisticated

Given the trusting nature of currency bazaar participants, it is not surprising that many foreign exchange traders find written confirmations unnecessary. After all, repeat players are unlikely to attempt to defraud one another for fear of being ostracized from the marketplace. Citibank’s attempt to renege on its agreement with DBS jeopardizes Citibank’s own standing in the market. The foreign exchange market has been characterized (in gender-biased terms) as a “gentleman’s market” where “a trader’s

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183. *IFEMA GUIDE*, *supra* note 14, § III.C, at 7.

184. *See supra* notes 152-60 and accompanying text.

185. The same writing standard set forth in U.C.C. § 2-201 cmt. 1 applies to sub-sections (1) and (2) of § 2-201. *See, e.g., Bazak Int’l Corp. v. Mast Indus. Inc.*, 538 N.Y.S.2d 503, 508 (1989).

186. U.C.C. § 2-201 cmt. 3.

187. *FEC 1990*, *supra* note 172, at 5.

188. *Id.*

189. *Id.*

word is his bond." When the DBS trader responds "120 million yen, yours, at 104," a deal is struck. To renege is to lose credibility.

Overall, market participants police themselves by refusing to deal with those who cannot be trusted to fulfill obligations to which they have committed verbally. Because the market has been generally free from the maladies of fraud and deceit, this self-regulating mechanism has worked. Rigid adherence to section 2-201(2) is, therefore, unnecessary.

This point leads to a reconsideration of one of the purposes of the statute of frauds, namely, precluding the enforceability of contractual claims where a party does not knowingly assume a contractual obligation.<sup>190</sup> The hidden presumption is that parties are unsophisticated and need protection from wandering unwittingly into a legally enforceable obligation. Yet, foreign exchange market participants hardly need such protection. They are large commercial and investment banks, corporations, and investment funds. Not surprisingly, they are acutely aware not only of the risks of trading in the currency bazaar, but also of how trades are negotiated, executed, and consummated.

##### 5. The Tension with the Parol Evidence Rule

Written confirmations are not only irrelevant in practice and unnecessary for the sophisticated market participants of the currency bazaar, but they are also potentially dangerous. Insofar as the contractual terms in them are inconsistent with those stated in the tape recorded telephone conversations, they may generate problems of parol evidence. Suppose the dollar-yen transaction between Citibank and DBS is a thirty-day forward purchase of yen entered into on November 1, i.e., the value date is November 30.<sup>191</sup> The operations department official of Citibank records the terms of the transaction; however, instead of indicating that 120 million yen are purchased, she records that yen are sold. This confirmation is sent to DBS within a reasonable time, and DBS does not send an objection to the confirmation within ten days after it is received. Pursuant to U.C.C. section 2-201(2), the formal requirements of section 2-201(1) are met.

While enforceability is not an issue, what exactly should be enforced is in doubt. On the value date, Citibank demands \$1,153,846.15 from DBS, which replies that Citibank is entitled to 120 million yen. Plainly, Citibank's written confirmation is incorrect. It is certain to be inconsistent with the tape recording of the conversation between the Citibank and DBS traders. It also may be inconsistent with Citibank's deal ticket. To ascertain whether Citibank bought, instead of sold, yen, the operations department officials of the two banks must speak with each other, examine their deal tickets, and check the confirmations against the tape recordings and deal tickets.

The point is that the greater the number of sources which evidence the agreement, the greater the probability of inconsistencies in the

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190. See, e.g., Scarborough, *supra* note 108, at 22.

191. For a discussion of forward transactions, see *supra* note 17.

sources. Requiring more confirmations of a trade is not necessarily a safeguard against error. To the contrary, it can foster errors, thus exacerbating risk and confusion in the currency bazaar.<sup>192</sup> Had the parties relied on the tape recordings, the mess may have been averted. This scenario is hardly far-fetched. Indeed, its facts resemble those in *Intershoe, Inc. v. Bankers Trust Co.*<sup>193</sup> Moreover, as one foreign exchange market observer stated, “[t]here cannot be any market dealer anywhere who has never done a deal ‘the wrong way round’, or for the wrong amount, or the wrong value date, or some other major error at some time.”<sup>194</sup>

In this Citibank-DBS dispute, the parol evidence rule of section 2-202 must be applied to determine the terms of the transaction.<sup>195</sup> This application yields two principal difficulties. First, the methodology used when applying this rule is uncertain. Second, the rule can produce erroneous results.

With respect to methodology, the Court must decide whether Citibank’s written confirmation is the final expression of the parties with respect to the terms of their agreement. Then, the court must decide whether the confirmation constitutes an integrated agreement. Assuming the writing itself does not indicate that it is or is not the complete, conclusive statement of the terms, the Court must make this determination. To be sure, the standard the Court must apply under Article 2 is clearer than

192. It can also foster disputes about whether the contents of a document are adequate to allow a court to conclude that the document constitutes a writing for purposes of the statute of frauds. See, e.g., *Levin v. Knight*, 780 F.2d 786, 790 (9th Cir. 1986) (concerning whether a written memorandum contained enough of the essential terms, with sufficient specificity, to evidence a contract).

193. In *Intershoe*, 569 N.Y.S.2d 333 (N.Y. 1991), a shoe importer, Intershoe, entered into thirty-week dollar-Italian lira forward transactions with Bankers Trust. (The court erroneously referred to these transactions as “futures.” Because they took place in the over-the-counter market and not on an organized exchange, they are forwards. See Bhala *supra* note 2, at 100). Bankers Trust sent Intershoe a confirmation indicating that it had bought 537,750,000 lira from, and sold \$250,000 to, Intershoe. Intershoe signed the confirmation and returned it to Bankers Trust. Just before the delivery date, Intershoe said that it had bought, not sold, lira. Intershoe’s attempt to introduce a supporting affidavit was rebuffed by virtue of Section 2-202. The court found the confirmation to be the final expression of the parties’ agreement. *Intershoe*, 569 N.Y.S.2d at 335.

Curiously, while the disputed transactions were negotiated and concluded by telephone, the court did not refer to the tape recordings of the parties’ conversations. Moreover, the court’s dicta that “a confirmation slip or similar writing is usually the only reliable evidence of such transactions,” *id.* at 336-37, is factually erroneous.

194. JOHN HEYWOOD, FOREIGN EXCHANGE AND THE CORPORATE TREASURER 109 (2d ed. 1979).

195. U.C.C. § 2-202 states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein *may not be contradicted by evidence of any prior agreement* or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade . . . or by course of performance; and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a *complete and exclusive* statement of the terms of the agreement.

(emphasis added).

under the common law.<sup>196</sup> Official comment 3 to section 2-202 states that extrinsic evidence of contractual terms must be excluded "[i]f the additional terms are such that, if agreed upon, they would *certainly* have been included in the document."<sup>197</sup>

Unfortunately, the U.C.C. Article 2 standard may be non-sensical and lead to uncertain results in a dispute such as that between Citibank-DBS where one party has confused the deal. Surely if Citibank had agreed to sell yen, then it would have stated so in the confirmation; consequently, tape recordings must be excluded from consideration. Yet, in fact, selling yen is exactly what Citibank agreed to do, as the tape recordings can prove. Citibank did not state it sold yen because of a clerk's innocent error in making the confirmation, the dishonesty of a trader in writing a deal ticket, or some other reason. Thus, on the one hand, a court might hold the Citibank confirmation is not an integration and, therefore, extrinsic evidence such as the tape recording should be admitted.<sup>198</sup> But, on the other hand, following a strict construction of the test in official comment 3, a court could come to the opposite conclusion. In sum, because application of the parol evidence rule may yield inconsistent results in similar cases, the important goal of providing certainty and predictability to foreign exchange market participants is lost.<sup>199</sup>

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196. One common law test, proposed by Professor Williston, focuses on whether reasonable parties, situated as were the parties to this contract, would have naturally and normally included the extrinsic matter in the writing. 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 638-39 (3d ed. 1961). Williston's test leads to the result that merger clauses usually are conclusive evidence of the completeness of a writing.

Professor Corbin advocated a two-step inquiry, not an objective "reasonable person" test. The judge should consider extrinsic materials to determine whether there is "respectable" evidence that an antecedent agreement was made. If so, then the judge should determine whether the antecedent agreement was discharged by the subsequent writing. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 582 (1960); RESTATEMENT (SECOND) OF CONTRACTS §§ 210(3), 214 (1981). Under Corbin's test, a merger clause is only one item of evidence weighed against other facts.

Yet another test, found in Sections 229 and 230 of the RESTATEMENT (FIRST) OF CONTRACTS (1932), asks whether reasonable persons in the parties' situation would have included the disputed provision in the contract.

Not surprisingly, Professor Murray, while discerning a movement toward the Corbin test, concluded that the case law "has been generally ineffective in articulating a workable rationale . . ." JOHN E. MURRAY, MURRAY ON CONTRACTS § 107, at 235-36 (2d rev. ed. 1974) (footnote omitted).

197. U.C.C. § 2-202 cmt. 3 (emphasis added). This comment is commended as a "consistent starting point" that improves on the common law. *See, e.g.,* Manire, *supra* note 7, at 1204. U.C.C. § 2-202 manifests Llewellyn's approach to the problem of deciding whether a writing is integrated.

198. One ground for this conclusion could be that Citibank's confirmation is "merely to furnish an aid to the writer's recollection." 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2429, at 96 (Chadbourn rev. 1981). A different ground could be that the confirmation is designed solely to satisfy the statute of frauds under U.C.C. § 2-201(2). Some cases have adopted this approach. *See, e.g.,* Southern States Dev. Co. v. Robinson, 494 S.W.2d 777, 782 (Tenn. Ct. App. 1972) (holding that if a memorandum meets the Statute of Frauds, the entire contract may be explained and proved by parol evidence); Nathan v. Spector, 120 N.Y.S.2d 358, (N.Y. App. Div. 1953) (holding that parol evidence may even be used to determine whether a memorandum meets the Statute of Frauds).

199. An interesting question is whether reformation of the terms stated in the confirmation is possible based on the tape recordings.

Strangely, neither the *Intershoe* nor *IBJ* courts applied the "would certainly" standard. In addition, neither court explained why it rejected this standard.<sup>200</sup> Both courts were inevitably dragged into fact-specific inquiries, but each court emphasized different facts. The *Intershoe* court focused on the terms stated in the confirmation itself.<sup>201</sup> In effect, it applied the four-corners test, looking only at the writing to decide its completeness. The *IBJ* court examined all the evidence of completeness and exclusivity, including evidence beyond the writing. It considered the intention of the parties, the history of their negotiations and relationship, and the omission of a signature from the confirmations.<sup>202</sup>

Not only did each court highlight different facts, but they also rendered diametrically opposed judgments. In *Intershoe* the parol evidence rule barred out extrinsic evidence, while in *IBJ* such evidence was admitted. Consequently, these cases have created considerable uncertainty in the currency bazaar. Participants cannot predict exactly how a court might analyze whether a confirmation is an integrated agreement or the likely result. Suppose the Court determines that Citibank's written confirmation is an integration of the agreement. The second difficulty resulting from the application of section 2-202 is that it leads to an erroneous result. The tape recording cannot be introduced as evidence because it contradicts the confirmation. The result is that incorrect contractual terms are enforced, namely, that Citibank delivers rather than receives yen. DBS was in the best position to correct the confirmation but failed to do so. This factor, however, should not be dispositive.

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200. One possibility arises from a close reading of U.C.C. § 2-202 cmt. 3, which refers to subsection (b). The comment indicates that the court should focus on whether the parties intended the writing to be a complete and conclusive statement of all the terms. If the parties so intended, then evidence of consistent additional terms must be kept from the trier of fact.

201. 569 N.Y.S.2d 333, 336. The facts of the case are discussed *supra* note 193.

202. *IBJ*, *supra* note 45, at 422-23. In *IBJ*, a Chilean company, Compania Sud-Americana de Vapores (CSAV) received foreign currencies in payment for its shipping services. The currencies were deposited in an account maintained by IBJ Schroder Bank & Trust ("Schroder"), which was responsible for converting the currencies into U.S. dollars and crediting CSAV's account with Schroder. Schroder confirmed each currency conversion transaction with CSAV. The gravamen of CSAV's complaint was that Schroder charged exchange rates that were in excess of spot market rates. *Id.* at 415-16.

These facts are distinguishable from those in *Intershoe* in certain key respects. *Intershoe* involved a written confirmation of a single transaction. The confirmation was an integrated document that reflected the terms to which the parties had agreed over the telephone. Consequently, the parol evidence rule barred the admission of extrinsic evidence to supplement or alter the terms of the transaction. *Intershoe*, 569 N.Y.S.2d at 337. *IBJ* involved a large number of currency conversions, and CSAV did not telephone Schroder to negotiate and conclude these transactions. Rather, the currency conversions were performed by Schroder pursuant to a prior overarching management agreement made with CSAV. The confirmations of each conversion were not intended to reflect this agreement. Hence, the parol evidence rule could not bar extrinsic evidence about its terms. *IBJ*, *supra* note 45, at 432.

The fact that *Intershoe* involved one confirmation whereas *IBJ* involved several is irrelevant for purposes of applying the parol evidence rule. A final expression of an agreement may be manifested in one or more documents. *WHITE & SUMMERS*, *supra* note 53, § 2-10, at 98. Accordingly, the decision in *B.N.E., Swedbank, S.A. v. Banker*, 794 F. Supp. 1291, (S.D.N.Y. 1992), *aff'd*, 996 F.2d 301 (2d Cir. 1993), is suspect. The *B.N.E.* court stated that *Intershoe* was irrelevant because it involved a single document whereas the case at hand involved several confirmation slips. *Id.* at 1292.



The effect of the parol evidence rule is "to give preference to the written version of [the] terms [of a contract]."<sup>203</sup> The justification for this preference is that "[w]ritings are more reliable than memories to show contract terms, and forgery is supposedly easier to detect than is lying on the witness stand."<sup>204</sup> Many critics of the rule emphasize that it is inconsistent with conventional processes of proof—juries should be allowed to hear all relevant evidence.<sup>205</sup> The criticism is even more poignant in the context of the currency bazaar where the conversation between the contracting parties is tape recorded. Obviously, a tape recording is the most reliable evidence of the transaction terms. The parol evidence rule compels a court to behave like an ostrich with its head in the sand. Application of the rule may specifically exclude the one form of evidence that can conclusively resolve whether Citibank bought or sold yen.

In sum, there is a tension between section 2-201(2) and the parol evidence rule. The former can be satisfied with a written confirmation to which there is no objection. The confirmation, however, generates a potential problem under section 2-202. It may transform the most reliable evidence of the transaction, the tape recording, into parol evidence. Therefore, the use of tapes to resolve disputes about terms becomes uncertain.

#### 6. The Tension with the Battle of the Forms Rule

A similar tension exists between U.C.C. section 2-201(2) and Article 2's provision on the battle of the forms, section 2-207. Suppose both Citibank and DBS issue and exchange written confirmations on the trade date, November 1, after they reach an oral agreement evidenced by a tape recording.<sup>206</sup> These confirmations, printed on each bank's standard form, conflict. Citibank's confirmation says that it bought 120 million yen for value on November 30, whereas DBS's confirmation says that the value date is November 3. DBS does not notify Citibank of any objection to the terms of Citibank's confirmation, but on November 3 it sends 120 million yen to Citibank and asks Citibank for the reciprocal delivery of \$1,153,846.15. Citibank objects, saying the deal involved the forward, not spot, sale of yen.<sup>207</sup>

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203. WHITE & SUMMERS, *supra* note 53, § 2-9, at 95.

204. *Id.*

205. *Id.* at 95 & n.3.

206. The above hypothetical is a combination of Cases (1) and (6) in WHITE & SUMMERS, *supra* note 53, § 1-3, at 30-36, 43-46. See also Douglas G. Baird & George Weisberg, *Rules, Standards, and the Battle of the Forms; A Reassessment of Section 2-207*, 68 VA. L. REV. 1217-19 (1982) (discussing the scenarios to which the battle of the forms refers). For a recent survey of proposed revisions to U.C.C. § 2-207, see *Ending the "Battle of the Forms": A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*, 49 BUS. LAW. 1019 (1994). Except for the additional fact regarding the tape recording, the hypothetical is one of the two paradigmatic cases that U.C.C. § 2-207 is designed to deal with: "the written confirmation [situation], where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed." U.C.C. § 2-207 cmt. 1.

207. See *supra* note 17 regarding forward transactions.

Here the problem is the battle of the forms and application of section 2-207. Assuming the confirmations do not constitute an integrated agreement, if the terms of the Citibank and DBS confirmations conflict or if one confirmation omits a term that the other includes, then a court must determine which terms are part of the contract.<sup>208</sup> Applying section 2-207 again highlights the importance of the tape recorded conversation and the disruption caused by the very use of written confirmations.<sup>209</sup>

Because the confirmations state different delivery dates, the threshold question is whether section 2-207(2) covers different as well as additional contractual terms.<sup>210</sup> The answer is uncertain. Even though U.C.C. section 2-207(1) expressly refers to "different" terms, section 2-207(2) does not contain this language. "[T]he drafters could easily have inserted 'or different' if they had so intended."<sup>211</sup> Official comment 3 to U.C.C. section 2-207 and some case law, however, do indicate that different terms are covered.<sup>212</sup>

Assuming section 2-207(2) governs, its application is problematic. One interpretation is that the language "additional term" means "additional or different terms." Interpreted this way, U.C.C. sections 2-207(2)(b) and (c) indicate that an additional term automatically becomes part of the contract unless (i) that term "materially alter[s]" the contract or (ii) the recipient of the confirmation with the additional term objects to it within a "reasonable time" after receiving the confirmation. Because DBS failed to answer Citibank's confirmation "within a reasonable time after additional terms were proposed, it is both fair and commercially

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208. Note that U.C.C. § 2-202 automatically construes the writings as integrated to the extent that they agree on certain terms. *See, e.g.,* Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc., 600 F.2d 103 (7th Cir. 1979). Note also that U.C.C. § 2-207 has received considerable scholarly criticism. *See, e.g.,* Charles M. Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 6 UCC L.J. 237, 240 (1984) (arguing that § 2-207 has "discouraged the expansion of commercial practices through custom, usage, and agreement of the parties" and yielded "unsettled case law and consequent lack of uniformity . . ."); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 59 (1984) (arguing that offer and acceptance forms can be drafted to prevent the making of a contract, with the result that the common law mirror-image rule is reinstated); Baird & Weisberg, *supra* note 206 (arguing that § 2-207 is so vague that it leaves a number of questions unresolved).

209. According to the common law mirror image rule, one confirmation (presumably the first one sent) would be treated as an offer, while the other confirmation would be an effective acceptance only if it did not vary the terms of the offer. 1 RESTATEMENT (SECOND) OF CONTRACTS §§ 58-60 (1979); *see also* WHITE & SUMMERS, *supra* note 53, § 1-3, at 29-30. Because such a variation exists in the Citibank-DBS case, one of the confirmations would be treated as a counter-offer. To decide the terms of the contract, the Court would examine evidence of a prior oral agreement, including the tape recordings.

210. This section may be particularly relevant to the dispute because Citibank and DBS are "merchants." *See supra* note 169.

211. WHITE & SUMMERS, *supra* note 53, § 1-3, at 32 (footnote omitted).

212. U.C.C. § 2-207(1) operates automatically to convert a confirmation with different terms as a proposal for an addition to the contract. Official comment 3 indicates that "[w]hether or not additional or *different* terms will become part of the agreement depends on the provisions of subsection (2)." U.C.C. § 2-207 cmt. 3 (emphasis added); *see also* Westinghouse Electric Corp. v. Nielsons, Inc., 647 F. Supp. 896, 900 (D. Colo. 1986); Steiner v. Mobil Oil Corp., 569 P.2d 751 (Cal. 1977) (holding that § 2-207(2) applies to different and additional terms). *But see* WHITE & SUMMERS, *supra* note 53, § 1-3, at 32 nn.11-12.

sound to assume that their inclusion has been assented to."<sup>213</sup> The transaction, regardless of what the Citibank and DBS traders agreed to on tape, becomes a yen forward unless DBS persuades a court that the November 30 delivery date is a material alteration of the contract. Thus, the Citibank-DBS dispute becomes one of materiality of the delivery term.

This result is unsatisfactory. "Materiality" is a fact-specific determination that may involve protracted litigation.<sup>214</sup> While official comment 4 to U.C.C. section 2-207 provides limited guidance on what constitutes a "material alteration," the statute itself is silent on the matter. Thus, there is no guarantee of consistent results in other like cases.

An alternative and preferable approach to the application of section 2-207(2) is to focus on the advice provided in official comment 6:

Where clauses on confirming forms sent by both parties conflict each party must be *assumed to object* to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do *not* become part of the contract. The contract then consists of *the terms originally expressly agreed to*, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement.<sup>215</sup>

Plainly, the conflicting terms stated in the confirmation are not part of the contract (though this may not be the case under the proposed revisions to Article 2). Rather, a court relies on the tape recordings of the agreement as evidence of the value date that was originally agreed to by the Citibank and DBS foreign exchange traders.

In sum, under the latter approach to its application, section 2-207(2) may be equipped to handle the problem of inconsistent confirmations. Yet, this resolution begs the question of the repercussions of using such confirmations. There is a tension between the statute of frauds (specifically, section 2-201(2)) and section 2-207(2) in the context of the currency bazaar: satisfying the former with written confirmations lays the foundation for battle of the forms problems. Such problems are best avoided by eliminating confirmations and relying on the tape recording for dispositive evidence of the terms of the dollar-yen transaction.

#### D. *Linking the Resolutions of the Scope and Enforceability Problems*

The pragmatic strategy links the resolution of the enforceability and scope problems. Whether the definition of "goods" in U.C.C. section 2-105(1) ought to encompass foreign exchange should depend in part on

213. U.C.C. § 2-207 cmt. 6.

214. See, e.g., *Luedtke Eng'g Co., Inc. v. Indiana Limestone Co.*, 740 F.2d 598, 600 (7th Cir. 1984); *St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc.*, 687 F. Supp. 820, 827 (S.D.N.Y. 1988).

215. U.C.C. § 2-207 cmt. 6 (emphasis added).

whether the application of the statute of frauds serves the needs of foreign exchange market participants. As presently constituted and interpreted, it does not. The statute of frauds would render unenforceable many foreign exchange transactions that should be enforced. The statute may lead to problems of parol evidence and the battle of the forms. Therefore, Llewellyn's argument that "after two centuries and a half the statute stands, in essence better adapted to our needs than when it was first passed"<sup>216</sup> is unpersuasive. At least in the context of the foreign exchange market, the statute of frauds in U.C.C. Article 2 must be reformed or abolished through legislative or judicial action.

Does this argument necessarily dictate that foreign exchange should not be considered a "good"? The argument strongly suggests an affirmative answer. Such an answer, however, would be an overreaction. Thus, the Court should reject DBS's response to Citibank's statute of frauds defense. A final resolution of the scope problem depends on more than the outcome of the enforceability problem. A complete assessment of other significant Article 2 provisions in relation to the needs of the currency bazaar is needed.<sup>217</sup>

## V. EXTENDING THE PRAGMATIC STRATEGY TO OTHER SALES LAW

Parts III and IV considered the potential applicability of the U.C.C. to the Citibank-DBS dispute chronicled in Part II. This assumption is now relaxed. The application of three other sales laws to the scope and enforceability problems is considered below: revised U.C.C. Article 2, the CISG, and private sales law. Part V argues that the pragmatic strategy can be extended to deal with these problems under other sales law regimes.

### A. *Current Proposals to Revise U.C.C. Article 2*

One proposed revision would decisively resolve the scope problem by excluding all foreign exchange transactions from U.C.C. Article 2. Section 2-102(a)(23) of the December 1993 and August 1994 Drafts of revised Article 2 defines "goods" as "all things . . . that are movable . . . [h]owever, the term does not include . . . *foreign exchange transactions*."<sup>218</sup> Unfortunately, the Reporter's Notes do not indicate why foreign exchange transactions are expressly excluded. There is no suggestion that the exclusion reflects a calculated decision that the provisions of revised Article 2 would be inapposite to the currency bazaar, though this indeed may be the case.

Interestingly, the December 1993 and August 1994 Drafts also abolish the statute of frauds, thus resolving the enforceability problem. Section 2-201 states that "[a] contract . . . is enforceable whether or not there is a

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216. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931).

217. Such provisions include those relating to contract formation and remedies. See Bhala, *supra* note 74.

218. U.C.C. § 2-102(a)(23) (Tentative Draft Dec. 21, 1993) (emphasis added). Foreign exchange transactions are not excluded from the definition of "goods" in the September 1993 Draft.

writing signed or record authenticated by a party against whom enforcement is sought . . . .”<sup>219</sup> This change—a complete rejection of the tangibility paradigm—would, of course, meet the needs of foreign exchange market participants.

A more radical proposal regarding Article 2 is to revise it according to a “hub-and-spoke” model.<sup>220</sup> Core rules applicable to all contracts would form the hub from which spokes would emanate. The spokes would set forth principles designed for special transactions. Conceivably, one spoke could apply to foreign exchange transactions. The pragmatic strategy could support this radical approach if major provisions of Article 2, in addition to the statute of frauds, are not applied to the currency bazaar context.

B. *The United Nations Convention on Contracts for the International Sale of Goods (“CISG”)*

A literal reading of Articles 1(1) and 2(d) of the CISG makes it impossible to argue that the scope of the CISG encompasses foreign exchange transactions. Article 1(1) states that the CISG applies to “contracts of sale of goods between parties whose places of business are in different States,” but Article 2(d) excludes sales of money from the Convention.<sup>221</sup> Unlike U.C.C. section 2-105(1), Article 2(d) does not distinguish between money that is the subject of the contract (the commodity leg) and money that is used as payment (the payment leg). CISG Article 2(d) also fails to mention “things in action.”

The crude scope clause in the CISG is unfortunate because the way in which the CISG resolves the enforceability problem serves the needs of the currency bazaar. There is no statute of frauds in the CISG—here again rejecting the tangibility paradigm. Article 11 of the CISG states that “[a] contract of sale need not be concluded in or evidenced by writing.”<sup>222</sup> Thus, if the CISG applies to the Citibank-DBS dispute, then Citibank cannot argue that the dollar-yen contract is unenforceable. Moreover, questions about tape recordings as evidence of a contract, costs associated with written confirmations, and potential difficulties arising under Article 19 of

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219. U.C.C. § 2-201 (Tentative Draft Dec. 21, 1993). The September 1993 Draft contains essentially the same revision of Section 2-201 as the December 1993 Draft.

220. See U.C.C. REV. ART. 2 (Discussion Draft Feb. 10, 1994); Nimmer, *supra* note 10.

221. CISG, *supra* note 13, at 672. The States must be Contracting States (i.e., they have ratified or acceded to the CISG), or the applicable choice of law rules must lead to the application of the law of a Contracting State. Pursuant to CISG Article 95, the United States has taken a reservation to the choice of law provision. See *id.* at 693; MARTINDALE-HUBBELL, *supra* note 13, at IC-35; Smart *supra* note 13, at 1344-46. Under Article 6, parties are free to exclude the application of the CISG. CISG, *supra* note 13, at 673.

222. CISG, *supra* note 13, at 674. However, under CISG Article 96, a state can take a reservation to Article 11 if the law of that state provides that contracts must be in writing. *Id.* at 693-94. (Article 96 refers to “legislation” which presumably means that the law must take the form of a statute or civil code.) If a party to a sales contract has its place of business in a reserving state, then CISG Article 11 is inapplicable. *Id.* at 674 (Art. 12). Argentina, Belarus, Chile, China, Hungary, the Russian Federation, and the Ukraine have taken reservations under CISG Article 96 to Article 11. See MARTINDALE-HUBBELL, *supra* note 13, at IC-34 to IC-35.

the CISG (the provision on the battle of the forms) are irrelevant. In sum, the CISG's resolution of the enforceability problem strongly suggests that the scope of the CISG should cover the Citibank-DBS dispute.

The literal language of CISG Article 2(d) remains problematic, however, thus requiring a new judicial interpretation of that Article. For example, a court could find that a distinction is implied between commodity leg and payment leg monies. Yen are the subject of the contract and "goods" for purposes of determining the scope of the CISG. This finding is not unprecedented. In *In re Midas Coin Co.*, the court distinguished between those coins sold as a commodity for numismatic purposes and those coins used as a means of payment.<sup>223</sup> The *Midas* court was confronted with the definition of "goods." Like the CISG definition, the court noted without further elaboration that the term "includes all things which are movable . . . but does not include money."<sup>224</sup>

Here again, a court that renders a *Midas*-type decision under the CISG may be criticized for engaging in judicial activism or subscribing to results-oriented jurisprudence.<sup>225</sup> The global nature of the currency bazaar, however, remains. Many foreign exchange transactions cross international borders.<sup>226</sup> The participants in different countries will benefit from the lack of a statute of frauds and from certainty that the CISG applies to their transactions, instead of wondering which country's contract law governs.

### C. *Private Contract Law*

The outstanding example of private contract law in the currency bazaar is the International Foreign Exchange Master Agreement ("IFEMA").<sup>227</sup> Strictly speaking, there is no problem of scope under this law. Scope is a matter for the parties to decide. Parties can freely enter into the master agreement and designate the foreign exchange transactions that they want covered therein. Thus, for instance, Citibank and DBS can sign the IFEMA and indicate that it will govern dollar-yen spot transactions between their respective New York and Singapore offices.<sup>228</sup>

When a dispute arises concerning a transaction governed by the IFEMA, the scope problem resurfaces. The dispute must be resolved not by the IFEMA, but by interpreting the IFEMA under some other sales law regime, whether it be U.C.C. Article 2, revised Article 2, or the CISG.

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223. 264 F. Supp. 193, 197-98 (E.D. Mo. 1967), *aff'd sub nom.* Zuke v. St. Johns Community Bank, 387 F.2d 118 (8th Cir. 1968). The application of Article 2 to such transactions is not controversial. See, e.g., *Morauer v. Deak & Co.*, 26 U.C.C. Rep. Serv. (Callaghan) 1142 (D.C. Super. Ct. 1979) (applying Article 2 to the sale of gold and silver foreign coins).

224. *Midas*, 264 F. Supp. at 195 (citing MO. ANN. STAT. § 400.9-105(1)(f) (Vernon 1965)).

225. See *supra* notes 160-66 and accompanying text.

226. See *supra* note 18.

227. See IFEMA, *supra* note 14.

228. Alternatively, they could specify that the IFEMA governs spot transactions in all currencies between these two offices, spot transactions between multiple offices of Citibank and DBS, or some other category of transactions and offices.

Therefore, the IFEMA does not necessarily afford the parties certainty as to whether their transactions are enforceable.

The utility of the pragmatic approach again becomes evident; whether a particular sales law should govern the disputed transaction should depend on whether that law meets the needs of the parties. The IFEMA expressly states that in the event of a dispute between the parties as to the terms of their transaction, the tape recording is "the preferred evidence" of the terms, "notwithstanding the existence of any writing [namely, the IFEMA] to the contrary."<sup>229</sup> This provision, which states that market participants signing the IFEMA agree in writing to be bound by a tape recording, parallels the criterion from *Ellis Canning Co. v. Bernstein*.<sup>230</sup> Accordingly, if the *Bernstein* holding is adopted by the Court in the Citibank-DBS dispute, then those parties may be afforded greater certainty as to the enforceability of their foreign exchange trades.

Regardless of the IFEMA applicability, the disputed dollar-yen transaction would be enforceable under either revised Article 2 or the CISG because a statute of frauds is absent under both regimes. This result suggests that including foreign exchange transactions governed by the IFEMA within the scope of revised Article 2 or the CISG would support market needs. A different result is reached with respect to U.C.C. Article 2. A court may feel compelled to accept Citibank's defense that the IFEMA does not satisfy the minimal writing requirements of section 2-201(1). It certainly qualifies as a "writing" under section 1-201(46) and is "signed" according to section 1-201(39).<sup>231</sup> Uncertainty remains, however, as to whether the IFEMA must state the quantity of currency purchased, and if so, whether the IFEMA meets that requirement.

Arguably, the statute of frauds does not require that a writing state a quantity term, because there is no reference to such a term in section 2-201. Moreover, official comment 1 to U.C.C. section 2-201 indicates that "[a]ll that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction." A liberal construction suggests that a quantity term is not essential for the establishment of an enforceable contract.<sup>232</sup> If true, then all of the transactions covered by the IFEMA are enforceable.

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229. IFEMA, *supra* note 14, § 8.3.

230. 348 F. Supp. 1212, 1228 (D. Colo. 1972).

231. An interesting question arises as to whether the IFEMA is nothing more than a manifestation of intent to enter into a contract or is the contract itself.

232. See Caroline N. Bruckel, *The Weed and the Web: Section 2-201's Corruption of the U.C.C.'s Substantive Provision — The Quantity Problem*, 1983 U. ILL. L. REV. 811 (1983). Professors White and Summers adopt a similar approach: "a close reading of Section 2-201 indicates that all commentators may be wrong. An alternative interpretation is that only if the writing states a quantity term is that term determinative." WHITE & SUMMERS, *supra* note 53, at 76 n.12; see also *American Original Corp. v. Legend, Inc.*, 652 F. Supp. 962, 966 (D.Del. 1986) (finding that the word "all" is sufficient to create an output contract under the statute of frauds and that parol evidence may be admitted to ascertain the exact amount); *Riegel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784, 789 n.11 (5th Cir. 1975) (stating that under the White and Summers reading, if a quantity term is present, then it controls, but if no quantity term is contained in the writing, then the party seeking enforcement of the agreement can establish the term by parol evidence).

This construction, however, conflicts with the plain meaning of a different passage from the same official comment: "The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated."<sup>233</sup> In the context of the currency bazaar, the "quantity term" refers to the amount of currencies bought or sold. Yet, parties sign the IFEMA before negotiating or concluding any particular spot transaction. The IFEMA cannot predetermine how many yen Citibank purchases from DBS in a particular transaction.<sup>234</sup> Consequently, no master agreement can be effective against Citibank's statute of frauds defense.<sup>235</sup>

## VI. CONCLUSION

Private contract law does not resolve the problems of scope and enforceability. It simply leads judges, regulators, and market participants back to U.C.C. Article 2, revised Article 2, or the CISG. With respect to Article 2, absent legislative modification or judicial re-interpretation, the statute of frauds and associated tangibility paradigm are inimical to the technology and business practices of the currency bazaar. This fact is strong, but not conclusive, evidence that including foreign exchange transactions in the scope of Article 2 is at variance with the needs of market participants. Thus, the pragmatic strategy suggests that Citibank's defense under the statute of frauds should be rejected. It indicates that DBS's response to that defense, while perhaps an over-reaction, has merit.

With respect to revised Article 2 and the CISG, the pragmatic strategy suggests that it may be appropriate to include the foreign exchange transactions in the scope of these regimes. They properly reject the tangibility paradigm. Because these sales laws omit a statute of frauds, neither revised Article 2 nor the CISG renders important transactions in the global currency bazaar, like the Citibank-DBS dollar-yen deal, unenforceable.

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233. U.C.C. § 2-201 cmt. 1. The same requirements for a writing apply to § 2-201(1) and (2). To be sure, the official comment is deceptively simple. In effect, more may be required in a writing in order to satisfy the statute of frauds. See FARNSWORTH, *supra* note 159, § 6.7, at 409 (stating that the identity of the parties and the nature, subject matter, and the essential terms of the contract must be expressed).

234. Indeed, there is no separate quantity clause in the IFEMA. The definition of "FX Transaction" refers to a transaction between the parties "of an agreed amount" of one currency in exchange for another currency. IFEMA, *supra* note 14, § 1, at 4. Section 3.1 discusses the obligation of each party to deliver an "amount" of currency. *Id.* at 7.

235. The uncertainty is compounded by the fact that, assuming a quantity term is required, it is not clear what types of phrases constitute a "quantity term." At one extreme is a general quantity clause such as "a quantity of yen to be determined." The polar opposite is a specific quantity term, such as "120 million yen." The issue in choosing these alternatives (or some intermediate language) is whether to adopt "a mechanical construction of the quantity language of section 2-201(1)." Bruckel, *supra* note 174, at 815. For example, a mechanical construction is used in New York. See *Int'l Commercial Resources, Ltd. v. Jamaica Pub. Serv. Co.*, 612 F. Supp. 1153, 1155 (S.D.N.Y. 1985) (holding that even though the total dollar amount of a transaction was established, a writing that referred to "various goods that [defendant] intends to purchase" and "various material and equipment" lacked a quantity term and, therefore, did not satisfy the statute of frauds) (citations omitted).



