

ESSENTIAL PRINCIPLES OF CONTRACT AND SALES
LAW IN THE NORTHERN PACIFIC:
FEDERATED STATES OF MICRONESIA, THE REPUBLICS OF
PALAU AND THE MARSHALL ISLANDS, AND UNITED
STATES TERRITORIES

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This text includes international standards governing contract and sales law and summarizes the general contract and sales law that applies in the geographic region identified as the Northern Pacific. It is unique because it is the only text compiling the statutes and case law for contract and sales in one source for this particular region. Consequently, it is essential reading for members of the judiciary, academics, practitioners, law students, and businesses both within and outside the region.

The Northern Pacific region, which includes Micronesia, the State of Hawaii, the American territories of Guam, the Commonwealth of the Northern Mariana Islands and American Samoa, and the Republics of Palau and the Marshall Islands, either follows or are heavily influenced by the Anglo-American common law tradition and statutes governing contract and sales. Islands in this region have made efforts to adopt recognized uniform international contract

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standards, particularly the *Restatement (Second) of Contracts*, but customary law and traditional rights still have a significant impact upon the development of contract and sales law creating a unique amalgam of substantive law in the Northern Pacific region.

Although the focus of the text will be on those independent nations in the Northern Pacific that are developing their own unique substantive law identity, the text also will include a comparison to contract and sales law that is prevalent in the United States and applicable in its Northern Pacific State of Hawaii and in its Pacific territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Other U. S. territories in the Northern Pacific include Midway, Wake, Johnston Atoll, Baker, Howland and Jarvis, Palmyra, and Kingman. Due to the lack of population and reported cases, these islands are outside the scope of this text.

The article will emphasize any divergence, and highlight regional anomalies in the substantive law of contract and sales. It will also examine the inter-relationship between customary and traditional law and the law of contract and sales. This anthropological approach will highlight how regional custom and traditional law have interacted with Anglo-American concepts of contract and sales law to produce a unique blend of contract and sales law in this Northern Pacific region.

As a result of the research for this text, two significant developments were noted: 1) that the American Law Institute's *Restatements of Law* have been elevated from simply persuasive authority to the rule of decision in some of these Pacific Island nations, and 2) that the anthropological implications of local

custom and traditional law in substantive contract and sales law have created a unique regional amalgam.

As a baseline of analysis, the text will initially compare and contrast contract and sales law in the Northern Pacific region to international standards of contract and sales law set forth in the Uniform Commercial Code (UCC), which has been adopted in Hawaii, Guam, the Commonwealth of the Northern Mariana Islands, and, in part, by the Federated States of Micronesia. Additionally, this article will explore the *Revised Uniform Commercial Code (Revised UCC)* and the *Restatement (Second) of Contracts*, which is the current statutory rule of decision in Palau and Micronesia (and formerly the rule of decision in the Marshall Islands). Lastly, where applicable, the text will compare and contrast regional contract and sales law to the United Nations Convention on the International Sale of Goods (*CISG*), and the International Institute for the Unification of Private Law (*UNIDROIT*) Principles of International Commercial Contracts.

I. GENERAL REGIONAL HISTORY

The Federated States of Micronesia (FSM) is the largest of the Northern Pacific island groups formerly known as the Eastern and Western Caroline Islands. The Republics of Palau and the Marshall Islands are much smaller island groups in this same island chain.

In 1947, after World War II, these island nations became a United Nations Trust Territory under the supervision of the United States. In 1979, the Federated States of Micronesia formed a constitutional government still under supervision of the Trust Territory. Four of the Trust Territory districts (Kosrae,

Pohnpei, Truk, and Yap) decided to form a single federated Micronesian state in 1979. Palau and the Marshall Islands did not participate initially, officially declaring individual sovereignty later.

Although they adopted their constitutions in 1979, Micronesia and the Republic of the Marshall Islands did not officially become independent sovereign nations until 1986. Although declaring independence and adopting a constitution approximately the same time as Micronesia and the Marshall Islands, the Republic of Palau followed even later after a series of referenda officially becoming an independent sovereignty in 1994.

Other Pacific islands such as American Samoa, Guam, the Northern Mariana Islands, and Hawaii have continued their affiliation with the United States becoming a State, commonwealth, or territory of the United States. As such, they apply and follow the substantive common law of contract and sales as set forth in such authorities as the *Restatement (Second) of Contracts* and the UCC, which are applied in the United States. Appeals from the courts of these United States territories, commonwealths, or States are assigned either to the United States Ninth Circuit Court of Appeals or appealed directly to the United States Supreme Court.

A. FEDERATED STATES OF MICRONESIA¹

Micronesia is a fledgling democracy in the north Pacific eight degrees north of the equator. Its estimated population in 2004 was 108,155 scattered over 607 islands and nearly one million square miles of ocean. Total land mass is about 271 square miles or 702 square kilometers.

The Federated States of Micronesia are a former Trust Territory and Protectorate of the United States known previously as the Eastern and Western Caroline Islands. The Federated States of Micronesia became an independent sovereign nation on May 10, 1979 when it formed its own constitutional government. Authority was gradually transferred from the Trust Territory government to the new constitutional government from 1979 to 1986, and the FSM officially became independent on November 3, 1986. The UN Security Council officially terminated trusteeship on December 22, 1990.

Since September 17, 1991, Micronesia has had its own seat on the United Nations. The Federated States of Micronesia is the largest group of islands among the former Trust Territory and consists of four island states: Kosrae, Pohnpei, Chuuk, and Yap.

Under a Compact of Free Association, originally negotiated in November 1986 with the United States and recently renewed in December 2003, the United

¹ Information for this section was derived from a number of sources including: BBC News, *Country Profile: Micronesia*, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/country_profiles/1300849.stm. Map and general information obtained from the Central Intelligence Agency, *World Factbook - Micronesia, Federated States of*, <https://www.cia.gov/library/publications/the-world-factbook/geos/fm.html>; FSM UN Mission, <http://www.fsmgov.org/fsmun>; Ogden, Michael, R., *Micronesia, Federated States of*, *World Book Online Reference Center* 2004, <http://www.aolsvc.worldbook.aol.com/wb/Article?id=ar359830> (log-in required); AOL@School *Countrywatch - Micronesia*, http://aol.countrywatch.com/aol_country.asp?vcountry=115 (log-in required). See also, *The International Status and Personality of Micronesian Political Entities*, 16 ISLA J. INT'L L. 1 (1993).

States provides economic assistance and for the defense of these islands. English is the official and most commonly used language, although Trukese, Ponapean, Yapese, Kosrean, Ulithian, Woleaian, Nukuoro, and Kapingamarangi are spoken as well. The official currency of the Federated States of Micronesia is the United States dollar (USD).

B. REPUBLIC OF THE MARSHALL ISLANDS²

The Republic of the Marshall Islands (RMI) consists of two archipelagic island chains (the Ratak or “Sunrise” chain and the Ralik or “Sunset” chain) of 29 atolls and 1,225 islands covering an area of 181.3 square kilometers.

The estimated population of the Marshall Islands in July 2004 was 57,738. The Marshall Islands lie to the northeast of Micronesia and are located about half way between Hawaii and Australia.

The Marshall Islands adopted their Constitution on May 1, 1979. Like Micronesia, the Trust Territory gradually transferred authority to the constitutional government. The Marshall Islands officially became an independent nation in October 1986. Although independent, the Marshall Islands Compact of Free Association with the United States was extended for another twenty years in January 2004. The Marshall Islands officially became independent from the U.S. administered UN Trusteeship on October 21, 1986.

² The background information regarding the Marshall Islands was obtained from numerous sources including the “Country Facts” section of the United Nations website maintained by the Permanent Mission of the Republic of the Marshall Islands. The “Country Facts” section can be found at http://www2.un.int/public/Marshall_Islands/1/English/. Additional background information about the Marshall Islands were obtained from the Central Intelligence Agency, *World Factbook - Marshall Islands*, <https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html>; and AOL@School, *Country Watch - Marshall Islands*, http://aol.countrywatch.com/aol_country.asp?vCOUNTRY=111 (log-in required).

The Marshall Islands became a member nation of the United Nations on September 17, 1991.

The currency utilized in the Marshall Islands is the USD. The labor force of the Marshall Islands is primarily service based (57.7 percent) followed by agricultural (21.4 percent) and industry (20.9 percent). The Republic of the Marshall Islands also has favorable tax, maritime registration, and incorporation laws drawing offshore investment.

C. THE REPUBLIC OF PALAU³

The Republic of Palau (ROP) is a group of islands in the Northern Pacific Ocean located southeast of the Philippines covering an area of 458 square kilometers or roughly 190 square miles. The estimated population of the Republic of Palau in 2004 is 20,800. It is the westernmost archipelago in the Caroline chain consisting of six island groups totaling more than 300 islands. These 300 islands are divided into sixteen states.⁴ English and Palauan are the official languages in all but three of these states.⁵

The Republic of Palau adopted its Constitution in 1979, and became the Republic of Palau on January 1, 1981. The Trust Territory gradually transferred authority to the newly formed constitutional government. After 1986, Palau was

³ Background information regarding the Republic of Palau was obtained primarily from various sources including: AOL@School, *Countrywatch - Palau*, http://aol.countrywatch.com/aol_country.asp?vCOUNTRY=132 (log-in required); additional background information obtained from the Central Intelligence Agency, *World Factbook - Palau*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ps.html>; and the U.S. Department of State, *Background Note - Palau*, <http://www.state.gov/r/pa/ei/bgn/1840.htm>.

⁴ Aimeliik, Airai, Angaur, Hatohebei, Kayangel, Koror, Melekeok, Ngaraard, Ngarchelong, Ngardmau, Ngatpang, Ngchesar, Ngeremlengui, Ngiwal, Peleliu, and Sonsorol.

⁵ Sonsorol (English and Sonsorolese); Hatohebei (English and Hatohebei); and Angaur (English, Japanese, and Angaur).

the only remaining part of the U.S. Trust Territory until it adopted the Compact of Free Association with the United States in 1994 after a series of referenda. Palau officially became an independent sovereignty from the U.S. administered UN Trusteeship on October 1, 1994.

Although independent, the Republic of Palau signed the Compact of Free Association with the United States in 1982. The Compact went into effect twelve years later in October 1994, but only after eight referenda and an amendment to the Constitution. The Compact of Free Association with the United States was for a fifteen-year term, and is due to expire in 2009.

The official currency of the Republic of Palau is the United States USD. Like its neighbors, the Republic of Palau operates on a trade deficit. However, Palau's economic outlook is somewhat brighter than that of its island nation neighbors; its population enjoys a per capita income twice that of the Philippines and much higher than the neighboring island nations of Micronesia and the Marshall Islands. An estimated fifty thousand tourists visited Palau in 2000-2001. The prospects for the long-term tourist trade have been enhanced with expansion of air travel in the Pacific, the prospering economy of East Asian countries which border the region, and the willingness of foreigners to invest in infrastructure improvements.

D. OTHER TRUST TERRITORY ISLANDS AND UNITED STATES POSSESSIONS IN THE NORTHERN PACIFIC REGION

The remaining islands, Saipan, Rota, and other islands of the former United Nations Trust Territory, have become a commonwealth of the United States and are collectively referred to as the Commonwealth of the Northern

Mariana Islands (CNMI). Other U. S. territories in the Northern Pacific include: Midway, Wake, Johnston Atoll, Baker, Howland and Jarvis, Palmyra, and Kingman. American Samoa, which is south of the equator but on the cusp of the Northern Pacific region, is an unorganized, unincorporated territory of the United States.⁶ Hawaii became a U.S. State. Guam, which is also in the Northern Pacific region, remains an American territory. All of these United States territories and the State of Hawaii apply and follow American substantive law, and, as it particularly relates to this text, they apply the Anglo-American common law tradition in contract and sales law; employ the *Restatement (Second) of Contracts* and other texts as persuasive authority; and, in the case of the State of Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, have statutorily adopted the original version of the Uniform Commercial Code, which will be addressed in general terms throughout this text.

II. GOVERNMENT AND JUDICIAL BRANCH STRUCTURE

Like the federal, state, and territorial governments of the United States, the Federated States of Micronesia, the Marshall Islands, and Palau are divided into three co-equal branches of government: judicial, executive, and legislative. The Republic of Palau and the Micronesian State of Yap also recognize an equivalent “fourth” branch of government, a “Council of Chiefs,” which reflects the strong influence of customary or traditional law in the region.

⁶ A good basic source of information regarding American Samoa can be found at the American Samoa Bar Association Web site at <http://www.asbar.org>.

III. INTERRELATIONSHIP BETWEEN THE CONSTITUTION, STATUTORY RULES OF DECISION, AND CUSTOMARY LAW

The next section of the text will explore the interrelationship between Constitutional provisions, statutory rules of decision, and traditional rights and customary law in each jurisdiction.

A. FEDERATED STATES OF MICRONESIA

Article XI of the Micronesia Constitution, which addresses creation of the judicial branch, also contains a Judicial Guidance provision. It requires that Micronesian courts are to give equal consideration in the decision making process to the Constitution, Micronesian custom and tradition, statute or prior decision of the court, and the social and geographical configuration of Micronesia⁷.

When analyzing the constitution, Micronesian courts are required by Article XI, §11 to first look to the words of the Constitution and go no further if the Constitution resolves the issue.⁸ If that review does not resolve the issue, the courts can look to other sources of Micronesian law including the Journal of the Micronesian Constitutional Convention.⁹

⁷ CONSTITUTION OF THE MARSHALL ISLANDS , art. VI, § 1(1) (1979) provides: “The judicial power of the Republic of the Marshall Islands shall be independent of the legislative and executive powers and shall vest in a Supreme Court, a High Court, a Traditional Rights Court, and such District Courts, Community Courts, and other subordinate courts as are created by law”

⁸ See, e.g., *Nena v. Kosrae*, 5 FSM Intrm. 417, 422 (Kos. S. Ct. Tr. 1990); *Ponape Fed’n of Coop. Ass’ns v. FSM*, 2 FSM Intrm. 124, 127 (Pon. 1985); *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 342 (Pon. 1983); *FSM v. Tipen*, 1 FSM Intrm. 79, 82 (Pon. 1981).

⁹ See, e.g., *Alfons v. FSM*, 5 FSM Intrm. 402, 404-05 (App. 1992); *Robert v. Mori*, 6 FSM Intrm. 394, 397 (App. 1994); *Nena*, 5 FSM Intrm. at 422; *Tipen*, 1 FSM Intrm. at 82.

If ambiguity or doubt still exists, the Micronesian courts may look to decisions of the U.S. Supreme Court and other U.S. federal courts at the time the Micronesian Constitution was ratified in 1979 to determine its intent since the Micronesian Constitution is patterned on the U.S. Constitution.¹⁰ The FSM Supreme Court has indicated, however, that it does not “slavishly” follow interpretations of similar language by the United States and may look to the law of other nations, especially other Pacific nations, to determine whether approaches there may prove more useful in determining meaning of particular provision with the Micronesian Constitution.¹¹

The Federated States of Micronesia have also adopted a rule of decision statute, 1 F.S.M.C. §203, which indicates that the rules of the common law as expressed in the American Law Institute’s *Restatement of Laws* shall be the rule of decision in the courts of Micronesia. This rule of decision statute is a vestige of the Trust Territory Code, particularly 1 T.T.C. §103. The statutory adoption of the *Restatement of Laws* as the rule of decision is a unique regional development.

Where the language of the FSM Constitution differs from the U.S. Constitution, it is presumed that the framers of the Micronesian Constitution intended to take another path.¹² Where distinctions exist between the FSM Constitution and the U.S. Constitution, Micronesian courts are free to depart

¹⁰ See, e.g., Paul v. Celestine, 4 FSM Intrm. 205, 208 (App. 1990); Laion v. FSM, 1 FSM Intrm. 503, 523 (App. 1984); Jonas v. FSM, 1 FSM Intrm. 322, 327 n.1 (App. 1983); Lonno v. Trust Territory of the Pacific Islands (I), 1 FSM Intrm. 53, 69-70 (Kos. 1981); Ponape Transfer & Storage v. Federated Shipping, 4 FSM Intrm. 37, 41 (Pon. 1989); Etpison v. Perman, 1 FSM Intrm. 405, 414 (Pon. 1984); Ponape Chamber of Commerce v. Nett Mun. Gov’t, 1 FSM Intrm. 389, 394 (Pon. 1984); *In re Iriarte* (I), 1 FSM Intrm. 239, 249 (Pon. 1983); *Suldan*, 1 FSM Intrm. at 345.

¹¹ See, e.g., Fed. Bus. Dev. Bank v. SS Thorfinn, 4 FSM Intrm. 367, 371 (App. 1990); *Lonno*, 1 FSM Intrm. at 69 n.11, 71; *Aisek v. FSM Foreign Inv. Bd.*, 2 FSM Intrm. 95, 98 (Pon. 1985); *Tipen*, 1 FSM Intrm. at 83.

¹² See, e.g., *Tammow v. FSM*, 2 FSM Intrm. 53, 56-57 (App. 1985); *FSM Dev. Bank v. Estate of Nanpei*, 2 FSM Intrm. 217, 219 n.1 (Pon. 1986).

from foreign precedent and develop their own body of law consistent with the Constitution, Micronesian custom and tradition, and the social and geographic configuration of Micronesia.¹³

Tension exists between the Micronesian Constitution's Judicial Guidance Provision and the rule of decision statute requiring application of the American Law Institutes' *Restatements of Laws* as was noted in *Rauzi v. FSM*.¹⁴

In *Rauzi*, the court observed that 1 F.S.M.C. § 203,¹⁵ with its sweeping mandate that the *Restatements* and other common law rules as applied in the U.S. be the 'rules of decision,' would draw the courts in a direction other than required by the Constitution's Judicial Guidance Provision. The *Rauzi* court noted that FSM Const. Article XI, § 11 identifies the fundamental guiding principle of all Micronesian court decisions and that the judicial guidance provision requires that judicial decisions must be consistent with the Constitution, Micronesian custom and tradition, and the social and geographical configuration of Micronesia and not the *Restatements* of the American Law Institute or the decisions of the U.S. Courts concerning the common law as specified in statute.¹⁶

¹³ See *Luda v. Maeda Road Constr.*, 2 FSM Intrm. 107, 112 (Pon. 1985).

¹⁴ 2 FSM Intrm. 8 (Pon. 1985).

¹⁵ 1 F.S.M.C. § 203 states:

The rules of the common law, as expressed in the *Restatement* of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in applicable cases, in the absence of written law under section 201 of this chapter or local customary law applicable under section 202 of this chapter to the contrary and except as otherwise provided in section 205 of this chapter; provided, that no person shall be subject to criminal prosecution except under the written law of the Trust Territory or recognized customary law not consistent therewith.

¹⁶ *Rauzi*, 2 FSM Intrm. at 14. The *Rauzi* case echoes some of the concerns similarly stated by Justice Scalia while expressing his concern with the use of foreign precedent in constitutional

B. REPUBLIC OF PALAU

Article V of the Constitution of the Republic of Palau addresses customary law and traditional rights. As mandated by the Palau Constitution, statutes, and customary law are considered equivalent, but in case of conflict between the two, traditional rights are ultimately superior to statute.¹⁷

Section 2 of Article V of the Constitution of Palau specifically states:

Statutes and traditional law shall be equally authoritative. In case of conflict between statute and traditional law, the statute shall prevail only to the extent that it is not in conflict with the underlying principles of the traditional law.¹⁸

Like Micronesia, the rule of decision for the courts of Palau is established by statute.¹⁹ According to the rule of decision statute, the rule of decision for the courts of the Republic of Palau is the common law as expressed in the *Restatement of Laws* published by the American Law Institute, and it is understood and applied in the United States. The statutory elevation of the *Restatements* to the level that the *Restatements* are the rule of decision is a unique regional development and a remnant of the Trust Territory Code, 1 T.T.C. § 103.

interpretation, which can be found in his dissents in *Lawrence v. Texas*, 539 U.S. 558, 598 (2003); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002); and *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988).

¹⁷ See *Ngirchokebai v. Reklai*, 8 ROP Intrm. 151, 152 (2000); *Nakamura v. Markub*, 8 ROP Intrm. 39, 40 (1999); *Kumangai v. Isechal*, 1 ROP Intrm. 587, 590 (1989); *Morei v. Ngetchaung Lineage*, 5 ROP Intrm. 292, 293 (Tr. Div. 1995); and *In re Eriich*, 1 ROP Intrm. 134, 143 (Tr. Div. 1984).

¹⁸ CONSTITUTION OF THE REPUBLIC OF PALAU., art. V, § 2 (1979).

¹⁹ 1 P.N.C. § 303 (1990) states:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provided in section 305 of this chapter; provided that no person shall be subject to criminal prosecution except under the written law of the Republic or recognized local customary law not inconsistent therewith.

This regional adoption is unique because in the United States the *Restatements of Law* are not the rule of decision and are just one of many sources of persuasive authority often advocating minority views or developing trends.²⁰

The rule of decision statute, 1 P.N.C. § 303, is applicable to the extent that the rule of decision statute does not conflict with principles of traditional law and the constitutional mandate of Article V, Section 2.

As observed in numerous cases,²¹ the courts of Palau are bound by the rule of decision statute, 1 P.N.C. § 303, to apply the common law of the United States as expressed in the *Restatements of Law* in the absence of written law or local customary law to the contrary.

However, where local or customary law or written statute exist or conflict with the *Restatement of Laws*, or where there is a conflict between the rule of decision statute, 1 P.N.C. § 303, and Article V of the Constitution requiring application of the customary or traditional law, the Constitutional provision is superior and prevails; and customary or traditional law is to be considered superior to the rule of decision statute and the American Law Institutes' *Restatements of Law*.

C. REPUBLIC OF MARSHALL ISLANDS

Similar to Micronesia and the Republic of Palau, customary law is expressly recognized as a formal source of law in Article X, § 1 and § 2 of the

²⁰ It is for this reason that Chief Judge Carl Ingram indicated that the Marshalls Islands deleted the rule of decision statute from subsequent code revisions but why Justice Alexandro Castro of CNMI favors the *Restatements* and their minority positions which may be better suited for these small island nations.

²¹ For example, see such recent cases as *Winterthur Swiss v. Socio Micronesia*, 8 ROP Intrm. 169 (2000); *Jiangsu v. Ho*, 7 ROP Intrm. 268, 272 n.5 (1998).

Constitution of the Marshall Island. However, the scope and impact of traditional law in the Marshall Islands is significantly narrower than found in its island nation counterparts.

Article X of the Constitution of the Marshall Islands explicitly preserves traditional rights particularly as it relates to traditional rights of land notwithstanding those protected in the Bill of Rights or to transfers or contracts for the sale, mortgage, lease, license, or otherwise of land rights.²²

Another provision of the Constitution for the Marshall Islands establishes a Council of Chiefs to consult with the legislative body, the Nitijela, to ensure that legislation conforms to customary or traditional law.²³

Article XIII of the Marshall Islands Constitution perpetuates existing law until repealed or revoked and subject to any amendment which was in force on

²² CONSTITUTION OF THE MARSHALL ISLANDS , art. X, Section 1(1) (1979) provides:

Nothing in Article II shall be construed to invalidate the customary law or any traditional practices concerning land tenure or any related matter in any part of the Marshall Islands, including, where applicable, the rights and obligations of the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal.

Section 1(2) further states:

Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Marshall Islands, it shall not be lawful or competent for any person having any right in any land in the Marshall Islands under the customary law or any traditional practice to make any alienation or disposition of that land, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land, who shall be deemed to represent all persons having an interest in that land.

²³ See MARSHALL ISLANDS CONSTITUTION, art. III (1979) which creates the Council of Iroij and Article X, Section 2 that requires the legislative body to enact legislation consistent with or as a supplement to the rules of customary law or take into account traditional rights. Once the legislative body, the Nitijela, has declared customary law, the High Court has not been inclined to substitute its judgment for that of the legislature. For example, see the High Court December 1, 1993 order in *Kabua Kabua v. Kabua Family Defendants*, C.A. No. 1984-98 and C.A. No. 1984-102 (consolidated), slip op. at pp. 23-29.

or after the effective date of the Constitution. One particular provision in effect at the time of the Constitutional adoption was 1 T.T.C. § 103, which provided that the rules of the common law as expressed in the *Restatement of Laws* shall be the rule of decision in the Marshall Islands. This provision statutorily mandated application of the *Restatement of Laws* as the rules of decision in the Marshall Islands until the Code was amended in 1988, and the equivalent of 1 T.T.C. § 103 was deleted effective January 1, 1989. An interesting issue arises as to whether the *Restatements* are perpetuated in light of cases such as *Likinbod and Alik v. Kejlat*²⁴ which indicate that the Constitution's framework of governance has through the judiciary continued the common law in effect at the time of adoption as the governing law in the Marshall Islands, subject to customary law, traditional practice, or constitutional or statutory provisions to the contrary.

When interpreting constitutional or substantive law, the courts of the Marshall Islands frequently look to decisions of courts of other countries. In *RepMar v. Sakaio*,²⁵ the Supreme Court noted that when interpreting and applying the Constitution, the courts of the Marshall Islands are required by Article I, § 3(1) to look to, but shall not be bound by, decisions of courts of countries similar in relevant respect.

In regard to statutory interpretation, the Marshall Islands Supreme Court indicated *In the Matter of P.L. Nos. 1993-56 and 1994-87*,²⁶ that when challenging the validity of a statute under the Marshall Islands Constitution, the court can

²⁴ 2 MILR 65, 66 (1995).

²⁵ 1 MILR (Rev.) 182 (1989).

²⁶ 2 MILR 27, 35 (1995).

refer to, but is not bound by, the decisions of the United States courts if the challenged statute and the Constitutional provisions are similar in nature.

In *Kabua v. Kabua*,²⁷ the Supreme Court expanded the scope of inquiry beyond the United States indicating that if the constitution or constitutional provisions of other countries are not sufficiently similar, a court in the Marshall Islands may consider constitutions of states that are part of a federation, like their island nation neighbors, that have adopted common law if the constitutional provisions in those states are similar in relevant respect to the provisions of the Marshall Islands' Constitution.

In *Likinbod and Alik v. Kejlat*,²⁸ the Marshall Islands Supreme Court addressed the relationship between the common law and traditional law with the Constitutional framework. The court indicated that the common law tradition continued within the framework of governance by the Constitution, and that the Constitution perpetuates the common law which would include the substantive law of contract in effect as the governing law, as long as customary law, traditional practice, and the constitution or statute are not in conflict.²⁹

In 1988, the Marshall Islands issued a re-codification effective January 1, 1989 of its national code and repealed by omission 1 T.T.C. § 103 with its reference to the American Law Institute's *Restatement of Law*.³⁰ The Marshall Islands Code was recently modified again in 2003. It continued to repeal by omission the equivalent of 1 T.T.C. § 103. The 2003 revisions modified the

²⁷ 1 MILR (Rev.) 247, 251 (1991).

²⁸ 2 MILR 65 (1995).

²⁹ *Id.* at 66.

³⁰ See 1 M.I.R.C. § 2(b)(viii); § 3(1); § 6(1)(a)(1); § 6(2); § 12(1) and (2) (1989).

section numbering style to conform to the new code format. Despite these statutory omissions, cases such as *Likinbod and Alik v. Kejlat*³¹ hold that the *Restatement of Laws* would still be applicable, if not mandated, although not by statute as the “rule of decision,” because the framework of governance provided by the Constitution under Article XIII continues the common law in effect as the governing law at the time the Constitution was adopted in the absence of customary law, traditional practice, or constitutional or statutory provisions to the contrary.

When analyzing the applicability of customary law within the constitutional framework, a two-step analysis is required. When delineating the two-step process in *Lobo v. Jejo*,³² the Marshall Islands Supreme Court observed that custom and tradition have the force of law if adopted by the court or statute.

The Court stated:

Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.³³

IV. SOURCES OF REGIONAL CONTRACT AND SALES LAW

Contract and sales law in the Northern Pacific region is an amalgam of common law, legislation, and traditional or customary law. Contract law is generally considered common law evolving from judicial decisions. Because of perceived inadequacies in the common law relating specifically to contracts for the sale of goods, the Sale of Goods Act was promulgated in England in 1893 and

³¹ 2 MILR 65, 66 (1995).

³² 1 MILR (Rev.) 224 (1991). *See also*, *Zaion v. Peter*, 1 MILR (Rev.) 228, 331 (1991).

³³ 1 MILR (Rev.) at 226.

the Uniform Commercial Code was subsequently formulated in the United States. Sales law in the Northern Pacific region is generally governed by statutes patterned on the original English Sale of Goods Act in the Marshall Islands,³⁴ or by the Uniform Commercial Code in Hawaii, Guam,³⁵ and the Commonwealth of the Northern Mariana Islands.³⁶ American Samoa has its own unique and abbreviated Commercial Code, which is not patterned upon either the Sale of Goods Act or the UCC. In the absence of such statutes, such as in the Federated States of Micronesia, sales law is governed by the common law of contract.

Although there has been a statutory effort to rescind Spanish, German, and Japanese law in Micronesia,³⁷ it is still applicable and has residual effect particularly regarding contracts for the sale, lease or transfer of land.³⁸

Otherwise, the Northern Pacific region draws heavily upon the English

³⁴ English Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

³⁵ Guam adopted the UCC in its entirety on January 1, 1977 and it is cited GUAM CODE ANN., tit. XIII, § 10101 (2007).

³⁶ 5 C.M.C. § 1-101 et seq.

³⁷ 1 F.S.M.C. § 204 (1997) provides:

All laws, regulations, orders and ordinances heretofore enacted, issued, made, or promulgated by Spanish, German, or Japanese authority which are still in force in the Trust Territory are hereby repealed except as provided in section 205 of this chapter; provided, however, that nothing in this code shall change the effect of local custom which may have been included within the scope of the laws, regulations, orders, or ordinances enacted, issued, made or promulgated as aforesaid.

This statute is anthropologically significant in that it expressly acknowledges that local custom and tradition may have integrated with foreign imposed law, regulations, orders or ordinances imposed by the Spanish, German or Japanese authorities that previously controlled the region.

³⁸ 1 F.S.M.C. § 205 (1997) states

The law concerning ownership, use, inheritance, and transfer of land in effect in any part of the Trust Territory on December 1, 1941, shall remain in full force and effect to the extent that it has been or may hereafter be changed by express written enactment made under authority of the Trust Territory.

and American precedent, statutes governing sales, and the common law of contract tradition; however, the region is beginning to establish its own unique identity, in part, as it is anthropologically being assimilated into local traditional or customary law.

V. COMMON LAW PRINCIPLES

A. REPUBLIC OF THE MARSHALL ISLANDS

The Supreme Court of the Marshall Islands is obliged to follow the common law in the absence of any constitutional provision, legislative act, or any custom or traditional practices of the Marshallese people to the contrary.³⁹ Thus, as mandated by the rule of decision provision in the Marshall Islands Constitution, the Marshall Islands primarily rely on the Anglo-American common law tradition stated in the *Restatements* or as generally understood in the former Trust Territories.⁴⁰

The rule of decision statute mandating application of the American Law Institute's *Restatement* was effective through January 1, 1989 but it was repealed by omission in the re-codification of the Marshall Islands Code in 1988. This de-emphasis of the American Law Institute's *Restatement of Laws* in the Marshalls differs from the Federated States of Micronesia and the Republic of Palau, which have statutorily perpetuated the Trust Territory rule of decision statute, 1 T.T.C. § 103. The *Restatement of Laws* is still persuasive authority as noted in cases such

³⁹ *Likinbod v. Kejlat*, 2 MILR 65 (1995); *RepMar v. Waltz*, 1 MILR (Rev.) 74, 77 (1987). See also 1 T.T.C. § 103 (1980).

⁴⁰ CONSTITUTION OF THE MARSHALL ISLANDS, art. XIII perpetuates 1 T.T.C. § 103 (1980) for the Former Trust Territory which incorporates American law as expressed in the American Law Institute's *Restatement* or as generally understood in the former Trust Territories.

as *Likinbod and Alik v. Kejlat*,⁴¹ which provide that under the Constitutional framework, the common law applicable at the time the Constitution was adopted continues in effect in the absence of customary, traditional law, constitutional, or statutory provisions to the contrary. Since the *Restatements* were the common law at the time of Constitutional adoption, they are perpetuated.

Although there is a strong American common law tradition, there is also a significant English statutory and common law influence as well.⁴² For example, Marshall Islands Sale of Goods Act of 1986 is patterned identically after the English Sale of Goods Act of 1893, with just minor linguistic alterations.⁴³

Further, there appears to be some substantive law diffusion occurring in the development of contract law and its alternatives in the Marshall Islands as reflected in a recent case that applied a mix of American, Canadian, and English common law.⁴⁴ Several factors contribute to this diffusion. First, High Court

⁴¹ 2 MILR 65 (1995).

⁴² Captain John Marshall of England was the first European to “discover” those islands which bear his name and English influence is perpetuated today through case law and application of the Marshall Islands Sale of Goods Act of 1986. An additional source of this English influence was the direct result of a Sri Lankan being retained as legislative counsel during the formative years of the Republic. See *Balos v. Tennekone*, 1 MILR (Rev.) 137 (1989) where the parties sought a writ of prohibition barring High Court Chief Justice Tennekone from hearing a case addressing the constitutionality of a statute based upon the Ceylonese Commission of Inquiry Act that he had drafted when he was legislative counsel.

⁴³ English Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

⁴⁴ In *Pacific International v. United States*, 2 MILR 244 (2004), the Supreme Court of the Marshall Island held that the operation of military bases is a purely governmental function and sovereign in nature citing *United States v. Public Service Alliance of Canada*, [1992] 2 S.C.R. 50, ¶42, 91 D.L.R. (4th) 449, 1992 Carswell Nat. 1005 (Can.) (with respect to a military base in Canada leased by the United States, the Supreme Court of Canada stated, “I can think of no activity of a foreign state that is more inherently sovereign than the operation of such a base.” As such, the United States government must be granted the unfettered authority to manage and control employment activity at the base.); *Holland v. Lampen-Wolfe* [2000] 3 All E.R. 833, [2001] I.L. Pr. 49, 2000 WL 976034 (HL) ([t]he maintenance of the base itself was plainly a sovereign activity. As Hoffman L.J. (Now Lord Hoffman) said in *Littrell v. United States (No. 2)*, “this looks about as imperial an activity as could be imagined”); and *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961) (“the governmental function...here was...to manage the internal operation of an important federal military establishment. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control.”) Consequently, the

Chief Judge Carl Ingram was legally trained in the United States while Associate High Court Judge Richard Hickson was legally trained in Australia. The lawyers practicing in the jurisdiction have also trained in varying traditions and multiple jurisdictions. Second, the Constitution of the Marshall Islands contributes to this diffusion of contract and sales law by permitting the appointment of Judges from outside the Republic of the Marshall Islands to sit as visiting Supreme Court Justices by designation of the Cabinet.⁴⁵ This appointment process lends itself to a regional blend or diffusion of the development of the common law in the Marshall Islands.

For example, the Honorable Marty W.K. Taylor, Chief Justice of the Supreme Court of the Commonwealth of the Northern Mariana Islands, a United States protectorate, and the Honorable Arthur Ngiraklsong, Chief Justice of the Supreme Court of the Republic of Palau, sat by designation of the Cabinet in the Marshall Islands Supreme Court cases, *Gushi Bros v. Kios*⁴⁶ and *Hermios v. Minister of Internal Affairs*.⁴⁷ More recently, U. S. Court of Appeals Judge Alfred T. Goodwin from the United States Ninth Circuit Court of Appeals and U.S. Magistrate Judge Barry Kurren from Hawaii sat by designation of the Cabinet in the Marshall Islands Supreme Court case, *Pacific International v. United States of America*.⁴⁸

Supreme Court held that the United States government and the United States Army were immune from suit and that alleged, in part, tortious interference with contract, and tortious interference with prospective contractual and business relations and economic advantage.

⁴⁵ CONSTITUTION OF THE MARSHALL ISLANDS, art. VI, § 1(10) (1979).

⁴⁶ 2 MILR 120 (1998).

⁴⁷ 2 MILR 127 (1998).

⁴⁸ 2 MILR 244 (2004).

The *Pacific International* case is particularly interesting from a diffusion perspective in that United States judges sitting by assignment were citing Canadian and English precedent in support of the ultimate conclusion in the case while formulating the common law for the Marshall Islands.⁴⁹

This diffusion of the substantive law is not unique to contract law or to the Marshall Islands;⁵⁰ one sees judges from other jurisdictions serving as visiting judges in the appellate courts of other island nations in the region. These regional cross assignments usually are a result of conflict or necessity due to the lack of available regional judicial resources.

B. REPUBLIC OF PALAU

Under the rule of decision statute, the Republic of Palau relies upon the Anglo-American common law of contract as set forth in the American Law

⁴⁹ *Id.* Although *Pacific International*, 2 MILR 244, is not a constitutional law case and contract cases in the United States in its formative days frequently cited English precedent, in several recent decisions, U.S. Supreme Court Justice Antonin Scalia has been critical of the use of foreign precedent, English precedent excepted, and abandonment of national sovereignty in the interpretation of substantive constitutional law in exchange for an “internationalist” approach being adopted by federal courts and some of his colleagues on the United States Supreme Court. See Justice Scalia’s dissents in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, 536 U.S. at 347-48, Justice Scalia observed: “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people. ‘We must never forget that it is a Constitution for the United States of America that we are expounding....’ Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.” (Quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-69, n.4 (1988). See also *Lawrence v. Texas*, 539 U.S. at 598. (Scalia, J. dissenting) (“Constitutional entitlements do not spring into existence because some states chose to lessen or eliminate criminal sanctions on behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.”)

⁵⁰ Diffusion of the substantive law is not a unique regional trend. There are several articles addressing this concept of diffusion in the substantive area of evidence law. For example, see Gatowski, Dobbin, Richardson, Nowlin, and Ginsburg, *The Diffusion of Scientific Evidence: A Comparative Analysis of Admissibility Standards in Australia, Canada, England, and the United States, and Their Impact on Social and Behavioral Sciences*, EXPERT EVIDENCE, 4(3), 86-92 (1996); Sophia Gatowski, Shirley Dobbin, James Richardson, Gerald Ginsburg, *The Globalization of Behavioral Science Evidence About Battered Women: A Theory of Production and Diffusion*, 15 BEHAV. SCI. & L. 285-305 (1997); James Richardson, “Brainwashing” Claims and Minority Religions Outside the United States: Cultural Diffusion of a Questionable Concept in the Legal Arena, 1996 BYU L. REV. 873 (1996).

Institute's *Restatement (Second) of Contracts*.⁵¹ As observed in numerous cases,⁵² the courts of Palau are bound by statute to apply the common law of the United States in the absence of written law or local customary law to the contrary.⁵³ Where local or customary law or written statute exists or conflicts, however, the Palau Constitution requires that local or customary law or statute would take precedent over American common law of contract and sales.⁵⁴

C. FEDERATED STATES OF MICRONESIA

Likewise, the Federated States of Micronesia is statutorily required to apply the Anglo-American common law of contract as set forth in the American Law Institutes' *Restatement (Second) of Contracts*⁵⁵ in the absence of any contrary statutes, decisions of the constitutional courts of Micronesia, or custom and tradition within Micronesia which would then take precedent.⁵⁶

Although there has been an effort to repeal Spanish, German, and Japanese laws in effect in Micronesia to the extent that they have not already been integrated into local custom,⁵⁷ the effects of prior colonization still linger in

⁵¹ 1 P.N.C. § 303 (1990).

⁵² For example, see recent cases such as *Winterthur Swiss v. Socio Micronesia*, 8 ROP Intrm. 169 (2000); *Jiangsu v. Ho*, 7 ROP Intrm. 268, 272 n.5 (1998).

⁵³ 1 P.N.C. § 303 (1990).

⁵⁴ CONSTITUTION OF THE REPUBLIC OF PALAU, art. V, § 2 (1979).

⁵⁵ 1 F.S.M.C. § 203 (1997).

⁵⁶ CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA, art. XI § 11 (1979). In *Semens v. Continental Airlines*, 2 FSM Intrm. 131 (Pon. 1985), the court looked to the intention of the parties to determine whether the contract was to be governed by customary law. In the absence of such an express intent, the court applied the common law of the United States. *See also* *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 90-91 (Pon. 1987) (The court indicated that the common law decisions of the United States are an appropriate source of guidance for the FSM Supreme Court for contract issues which are unresolved by statutes, decisions of constitutional courts or custom and tradition within the FSM).

⁵⁷ 1 F.S.M.C. § 204 (1997).

that Spanish, German, and Japanese laws in effect as of December 1, 1941, which involve contracts for the ownership, sale, lease, or transfer of land currently remain in effect until statutorily modified.⁵⁸

VI. REGIONAL LEGISLATION

In addition to the common law, contract and sales law is also governed by various pieces of regional legislation. In those instances where it exists, as outlined below, legislation governing the sale of goods supplants the common law of contract.

A. REPUBLIC OF MARSHALL ISLANDS

In the Marshall Islands, the law of contract is also governed by the American Law Institute's *Restatement of Contracts*, as mandated by the former Trust Territory Code which had an effective termination date of May 1, 1979;⁵⁹

⁵⁸ 1 F.S.M.C. § 205 (1997). *See also* Etschreit v. Adams, 6 FSM Intrm. 365 (Pon. 1994) in which Supreme Court Justice Andon Amaraich sitting as a trial judge eloquently addresses the socio-cultural anthropological impact of Spanish, German and Japanese culture and its conflict with Micronesian culture in this complex land partition case arising out of a land purchase in 1903 at a public auction conducted by the German government who had acquired the land from Spain several years earlier. The contract and deed contained standard German primogeniture provisions. To complicate matters, the purchaser died during the period of Japanese occupation, transferring the property to his heirs. The Japanese government largely ignored these German patrilineal primogeniture provisions and allowed ownership and division of land by both men and women. These German provisions, however, are contrary to local Micronesian matrilineal custom and the court concluded that these German rules of patrilineal primogeniture should not be applied to the land in question.

⁵⁹ CONSTITUTION OF THE MARSHALL ISLANDS art. XIII perpetuates 1 T.T.C. § 103 (1980) for the Former Trust Territory which incorporates American law as expressed in the American Law Institute's Restatement or as generally understood in the former Trust Territories.

the Sale of Goods Act of 1986;⁶⁰ the Unfair Business Practices Act;⁶¹ the Usury Act;⁶² and the Consumer Protection Act.⁶³

The *Restatement (Second) of Contracts* continued as the rule of decision in the Marshall Islands until January 1, 1989 when it was repealed by omission from the 1988 re-codification. The *Restatement (Second) of Contracts* remains persuasive authority because the common law in effect at the time of Constitutional adoption is perpetuated under the constitutional framework as noted in *Likinbod and Alik v. Kejlat*.⁶⁴ In a recent conversation with High Court Chief Judge Carl Ingram,⁶⁵ he indicated that one of the reasons that 1 T.T.C. §103 was omitted from the re-codifications was that the members of the Marshall Islands judiciary did not favor mandating the *Restatements* as the sole source for the rules of decision, particularly because the *Restatements* either took minority views or adopted developing trends.⁶⁶ Deleting this limitation opened the door for the judiciary to consult other sources of authority as well.

According to regional sources, the Sale of Goods Act of 1986 for the Marshall Islands has no legislative history and was drafted by legislative counsel

⁶⁰ 23 M.I.R.C. §§ 101-159 (2004).

⁶¹ 20 M.I.R.C. §§ 301-306 (2004).

⁶² 20 M.I.R.C. §§ 701-706 (2004).

⁶³ 20 M.I.R.C. §§ 401-415 (2004).

⁶⁴ 2 MILR 65 (1995).

⁶⁵ Interview with Carl Ingram, High Ct. C.J., High Ct. Republic of the Marsh. Is., Pacific Island Legal Institute (Feb. 7-11, 2005).

⁶⁶ On the other hand, Associate Supreme Court Justice Alexandro C. Castro of the Commonwealth of the Northern Mariana Islands recently indicated that the Restatement is preferred in the region because of its minority positions and that these minority positions are sometimes better suited for these island nations than they would be on Main Street USA. Interview with Alexandro C. Castro, Associate Supreme Court Justice, Commonwealth of the Northern Mariana Islands, Pacific Judicial Conference in Koror, Palau (Jun. 6-8, 2005).

from Sri Lanka, a former British colony.⁶⁷ Although the Marshall Islands may be influenced by the American common law of contract and sales in reviewing the Sale of Goods Act of 1986, it is readily apparent that the Marshall Islands' Sale of Goods Act of 1986 was patterned identically after the English Sale of Goods Act of 1893.⁶⁸

B. MICRONESIA AND PALAU

In the absence of legislation comparable to the UCC or English Sale of Goods Act, the Republic of Palau and the Federated States of Micronesia are primarily common law jurisdictions as it relates to the law of contract and sales. The substantive law of contract was previously governed by the former Trust Territory Code, which has been supplanted by the adoption of national codes in each respective jurisdiction.⁶⁹ As it relates to contract law, the former Trust Territory Code directed both of these jurisdictions to the American Law Institutes' *Restatement of Contracts*.

Although they have miscellaneous pieces of legislation in place, Palau and Micronesia have not enacted any legislation directly governing the sale of goods equivalent to the Sale of Goods Act utilized in the Marshall Islands; Article 2 of

⁶⁷ Correspondence from Chief Justice Carl Ingram, High Court, Republic of the Marshall Islands, dated 10/12/04.

⁶⁸ English Sale of Goods Act, 1893, 56 & 57 Vict., c. 71. An example of a deviation would be the deletion of English pounds in the statute of frauds provision.

⁶⁹ 1 F.S.M.C. § 203 (1997) in Micronesia and 1 P.N.C. § 303 (1990) in Palau perpetuate 1 T.T.C. § 103 (1980) for the Former Trust Territory which incorporates American law as expressed in the American Law Institute's Restatement or as generally understood in the former Trust Territories. Although the Federated States of Micronesia has nationally adopted 1 T.T.C. § 103 (1980) as 1 F.S.M.C. § 203 (1997), the individual States of Yap and Kosrae have effectively repealed this provision by adoption of codes that do not include this provision. In the State of Chuuk, this provision has not yet been repealed or deleted and still has some vitality as long as its application is not inconsistent with Chuuk custom or tradition or with the Chuuk Constitution or statutes.

the UCC applicable in the United States (including Hawaii); its territories (Guam, the Commonwealth of the Northern Mariana Islands); an abbreviated Commercial Code similar to that utilized in American Samoa; or comparable international standards promulgated by the United Nations Conference of the International Sale of Goods (*CISG*) or the *UNIDROIT* Principles of Contract Law. In the absence of such legislation, the common law of contract as set forth in the *Restatement (Second) of Contracts* prevails in Palau and Micronesia as long as it is not in conflict with local custom or tradition.

Title 33 of the Micronesia Code, which addresses Commercial Law, tracks the UCC provisions but reserves for future development a number of chapters which would directly govern contracts for the sale of goods including Chapter 2 for Sales and Chapter 3 for Commercial Paper. Although these particular chapters have been reserved for future development, Micronesia has adopted a portion of the UCC, which has minimal bearing upon sales or contract law. Specifically, Micronesia has adopted UCC Chapter 8, which addresses Investment Securities⁷⁰ and UCC Chapter 9 governing Secured Transactions.⁷¹

The version of UCC Chapter 9 adopted by the FSM is rudimentary and truncated. This creates some irony in that Article 9 provides for security interests in goods, but there is no provision governing the sale of goods, i.e. Article 2, and there is no system for recording security interests contained in the statute so virtually all “secured interests” in goods are “secret liens” and thus unenforceable against third parties.⁷²

⁷⁰ 33 F.S.M.C. §§ 801-808 (1997).

⁷¹ 33 F.S.M.C. §§ 901-933 (1997).

⁷² See, *In re Engichy*, 11 FSM Intrm. 520, 530 (Chk. 2003); *UNK Whole Sale v. Robinson*, 11

In addition to the common law of contract and to the extent applicable, the law of contract and sales law in Micronesia and Palau are also governed piecemeal by the Consumer Protection Act,⁷³ the Anticompetitive Practices Act,⁷⁴ or Unfair Business Practices Act,⁷⁵ and the Usurious Interest Act.⁷⁶ The individual States of Pohnpei in Micronesia⁷⁷ and the Republic of Palau have also adopted the Statute of Frauds.⁷⁸

C. UNITED STATES TERRITORIES, COMMONWEALTHS, AND STATES

In addition to the common law, the Northern Mariana Islands, Guam, and the State of Hawaii have comparable legislation governing contract and sales law. Legislation governing contracts and sales in American Samoa is different than in the other United States Territories and commonwealths. Contract and sales law in the Commonwealth of the Northern Mariana Islands is governed by

FSM Intrm. 361, 365 (Chk. 2003); *Bank of Hawaii v. Kolonia Consumer Coop. Ass'n*, 7 FSM Intrm. 659, 644 (Pon. 1996); *In re Island Hardware*, 3 FSM Intrm. 332, 340 (Pon. 1988); *Bank of Guam v. Island Hardware*, 2 FSM Intrm. 281, 289 (Pon. 1986).

⁷³ See generally Palau Consumer Protection Act, 11 P.N.C.A. § 201; Micronesia Consumer Protection Act, 34 F.S.M.C. § 101.

⁷⁴ See generally Micronesia Anticompetitive Practices Act, 32 F.S.M.C. § 301.

⁷⁵ See generally Palau Unfair Business Practices Act, 11 P.N.C.A. § 101.

⁷⁶ See generally Palau Usurious Interest Act 11 P.N.C.A. § 301; Micronesia Usury Act, 34 F.S.M.C. § 201. A Micronesian case raising a usury defense is *Richmond Whole Meat v. Kolonia Consumer Coop Ass'n*, 7 FSM Intrm. 387 (Pon. 1996) in which plaintiff Richmond provided a product to defendant and defendant was supposed to pay. The dispute over a difference of \$20.80 escalated to \$1039.99 with compounding interest. The Plaintiff moved for summary judgment which the trial court granted in part and denied in part, indicating that the only issues for trial were the amount of the one invoice in dispute and whatever interest the Plaintiff may claim. *Id.* at 389-90.

⁷⁷ The Micronesian State of Pohnpei has adopted the Statute of Frauds in Pon. S.L. No. 2L-38-80. However, Yap and Kosrae have not adopted the Statute of Frauds. Further, there is no Statute of Frauds recognized in Chuuk and has been expressly rejected as being inconsistent with Chuuk tradition and culture. *Marcus v. Truk Trading Corp.* 10 FSM Intrm. 387, 389 (Chk. 2001). See also *Marcus v. Truk Trading*, 11 FSM Intrm. 152 (Chk 2002).

⁷⁸ See 39 P.N.C. § 501.

the Uniform Commercial Code,⁷⁹ a Statute of Frauds,⁸⁰ and a Consumer Protection Statute.⁸¹ Similarly, Guam has also adopted the Uniform Commercial Code,⁸² a Statute of Frauds,⁸³ and a Consumer Protection Statute,⁸⁴ which regulate contracts in that particular U.S. territory. The State of Hawaii also utilizes the Uniform Commercial Code⁸⁵ and has adopted the Statute of Frauds⁸⁶ and a Consumer Protection Act.⁸⁷ Lastly, American Samoa has adopted a Consumer Protection Act creating a Commission to investigate consumer complaints,⁸⁸ a Warranties Act,⁸⁹ a Statute of Frauds,⁹⁰ and an abbreviated version of a Commercial Code.⁹¹ The American Samoa Commercial Code is far different than the UCC and the Marshall Islands Sale of Goods Act, which are applicable in the region.

VII. INTERRELATIONSHIP BETWEEN REGIONAL CUSTOMARY OR TRADITIONAL RIGHTS AND CONTRACT AND SALES LAW

The interrelationship between customary law, traditional rights and contract and sales law in this region will also be explored in this text. There are a

⁷⁹ 57 C.M.C. § 1101.

⁸⁰ 2 C.M.C § 4912.

⁸¹ 4 C.M.C. § 5101.

⁸² GUAM CODE ANN., tit. XIII, § 10101 (2007).

⁸³ GUAM CODE ANN., tit. XIII, § 1206 (2007).

⁸⁴ GUAM CODE ANN., tit. V, § 32101 (2007).

⁸⁵ HAW. REV. STAT. § 490-10 (2004).

⁸⁶ HAW. REV. STAT. § 656-1 (2004).

⁸⁷ HAW. REV. STAT. § 487 (2004).

⁸⁸ AM. SAMOA CODE ANN. § 27.0401-0406(1982).

⁸⁹ *Id.* at § 27.0701-0704.

⁹⁰ *Id.* at § 27.1530.

⁹¹ *Id.* at § 27.1501.

number of leading socio-cultural anthropological texts which have engaged in cross-cultural comparative studies of legal systems but there have been very few which have focused on the Northern Pacific island region. Although the relationship between anthropology and law have been described by some as a “balanced reciprocity,”⁹² relationships based on customary law and traditional rights do not necessarily correspond with traditional concepts of contract law and conflict does arise. Where there is conflict, the traditional concept of contract law is either adopted in lieu of local customary or traditional law, assimilated with local custom or tradition creating a unique regional blend, or rejected.

Societies based on custom and traditions have been described as “status based” societies where rights and duties are defined by a person’s place in society rather than by agreement. As societies progress, there is also an anthropological metamorphosis or assimilation that occurs. This evolutionary process was described by Maine in *Ancient Law*, as “a movement from Status to Contract.”⁹³ In *The Cheyenne Way*, Llewellyn and Hoebel, while discussing the

⁹² JAMES M. DONOVAN & H. EDWIN ANDERSON III, *ANTHROPOLOGY & LAW* (Berghahn Books 2003). Adopts a theory of “balanced reciprocity.” It is defined as follows:

Balanced reciprocity means that neither discipline is independent of, parasitic upon, or subordinate to, the other. Anthropology, to realize its own vision, needs a collateral discipline of jurisprudence; law, in order to achieve its goal of justice and social order, requires the theoretical grounding and empirical conclusions of anthropology. *Id.* at 2.

⁹³ HENRY SUMMER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (Beacon Press 1963). Maine stated:

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of persons were derived from, and to some extent are still colored by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract. *Id.*

necessary integration of any legal system in order to be successful and the informal pressures on and integration of the individual, observe:

The extension of the sphere and importance of observable law in the more highly developed societies is not in itself an index of social progress. It is merely an index of a greater complexity of the society and hence of the norms or imperatives to be observed, and hence, finally, of an increasing difficulty in obtaining universal adherence to such norms. Conversely, this means that the less call there is for law as law, and upon law as law (relative to the degree of complexity of a society), the more successful is that society in attaining a smooth social functioning.⁹⁴

Anthropologically, there is both evidence of integration and divergence in regard to contract and sales law in the Northern Pacific region. These cases will be discussed at various points in the text. To the extent that these island nations diverge due to the impact of customary or traditional law in the areas of contract formation, performance, and enforcement, this text will identify and attempt to explain the differences between the concepts of customary law and contract law.

Despite the potential for conflict and differences between concepts of traditional rights or customary law and traditional notions of contract law, the two concepts do anthropologically integrate and assimilate or, at a minimum, achieve a “balanced reciprocity,” as these societies move from status based relationships toward societies governed by contractual relationships.

A. REPUBLIC OF THE MARSHALL ISLANDS

Customary law is expressly recognized as a formal source of law in the Marshall Islands.⁹⁵ To the extent that customary law is recognized as a formal

⁹⁴ KARL N LLEWELLYN & E ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (University of Oklahoma Press, 1941).

⁹⁵ CONSTITUTION OF THE MARSHALL ISLANDS, art. X §§1-2, (1979).

source of law, it may be considered superior to the common law of contract or sales in matters of a local or traditional culture. There are a number of Marshall Islands cases in which contracts, particularly for the sale or transfer of land, have been declared void because they have violated traditional rights.⁹⁶

The implication of traditional rights and customary law is more constitutionally limited in the Marshall Islands than in its neighboring Pacific Island nations. The language of the Marshall Islands Constitution specifically restricts the impact of traditional law to contracts for the sale, lease, or transfer of land. Although limited, the relationship between customary law and the law of contract and sales is still significant, especially with local construction contracts involving land development and foreign property investors. To the extent that the courts in the Marshall Islands apply custom and tradition to cases involving contract creation, interpretation, enforcement or breach of contract, local custom, and tradition is equivalent to and has the force of law.⁹⁷

Where contract and sales law, and customary and traditional law intersect, two inquiries must be made in the Marshall Islands:

Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.⁹⁸

Where the contractual matter is *not* of a local or traditional nature, the Sale of Goods Act of 1986, the common law of contract in effect at the time of

⁹⁶ For example, *see* *Tobeller v. David*, 1 MILR (Rev.) 81 (1987); *Jack v. Hisaiah and Hisaiah*, 2 MILR 206 (2003).

⁹⁷ *See* *Jack*, 2 MILR (Rev.) at 206; *Gushi Bros. v. Kios*, 2 MILR 120 (1998); *Hermios v. Minister of Internal Affairs*, 2 MILR 127 (1998); *Tobeller*, 1 MILR (Rev.) at 81.

⁹⁸ *Lobo v. Jejo*, 1 MILR (Rev.) 224, 226 (1991); *See also* *Zaion, et. al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 331 (1991).

Constitutional adoption as set forth in the *Restatement (Second) of Contracts*, or comparable international standards would apply since the rule of decision statute has been repealed through subsequent omission.

B. FEDERATED STATES OF MICRONESIA

Anthropologically, there are two significant cases which address the interrelationship between customary and traditional law and the law of contract and sales in Micronesia: *Semens v. Continental Airlines (I)*⁹⁹ and *Etscheit v. Adams*.¹⁰⁰

The interrelationship between the Constitutional Judicial Guidance Clause in Article XI, § 11, the statutory requirements of 1 F.S.M.C. § 203, and contract law were initially addressed in *Semens v. Continental Air Lines, Inc. (I)*¹⁰¹ which established the framework for all cases which have followed. The *Semens* court indicated that where traditional or customary law conflicts with the rule of judicial decision statute requiring the Micronesian courts to apply the American Law Institute's *Restatement of Laws*, including the *Restatement (Second) of Contracts*,¹⁰² the Constitution mandates that traditional law and customary rights are both superior sources of law.¹⁰³

⁹⁹ *Semens v. Continental Air Lines, Inc. (I)*, 2 FSM Intrm. 131 (Pon. 1985).

¹⁰⁰ *Etscheit v. Adams*, 6 FSM Intrm. 365 (Pon. 1984), *rev'd on other grounds*, 6 FSM Intrm. 580 (App. 1994).

¹⁰¹ *Semens*, 2 FSM Intrm. 131. *See also* FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987) (Common law decisions of the United States are an appropriate source of guidance for the FSM Supreme Court for contract issues unresolved by statutes, decisions of constitutional courts, or custom and tradition within the FSM. Like *Semens*, the *Ocean Pearl* court concluded that the activity involved was not the kind that historically would fall within the principles of custom and tradition. *Id.* at 91.)

¹⁰² 1 F.S.M.C. § 203 (1980).

¹⁰³ CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA, art. XI, § 11 (1979).

The *Semens* case arose out of a personal injury accident, which occurred at the airport in Pohnpei in which the Plaintiff claimed personal injury damages were incurred while working for a subcontractor unloading cargo from a Continental Airlines plane.

In establishing a hierarchy of law, the *Semens* court initially observed that the Constitution was the supreme law of the land. According to the court, the next source of law in the hierarchy was not the common law of contracts, but traditional or customary law. The Court emphasized that before going (as required by the rule of decision statute) to the common law decisions from the United States, which would be authoritative for the Supreme Court regarding tort and contract issues, the court must determine that the issues are not to be resolved by: 1) local custom or tradition within Micronesia, 2) by statutes, or 3) by prior decisions of the Micronesian constitutional courts.¹⁰⁴

The court indicated:

[C]ommon law decisions of the United States are an appropriate source of guidance for this court for contract and tort issues unresolved by statutes, decisions of constitutional courts here, or custom and tradition within the FSM. Review of decisions of courts of the U.S. or any other jurisdictions, must proceed however against background of pertinent aspects of Micronesian society and culture.¹⁰⁵

The *Semens* court noted that even where the parties have not asserted that any principle of custom or tradition applies, the court still has a constitutional

¹⁰⁴ *Semens*, 2 FSM Intrm. at 140. See also *FSM v. Ocean Pearl*, 3 FSM Intrm. 87, 90-91 (Pon. 1987).

¹⁰⁵ *Semens*, 2 FSM Intrm. at 140. See also *Black Micro v. Santos* 7 FSM Intrm. 311 (Pon. 1995), which was a collection case in which the FSM court found that the U.S. common law rule regarding the assignment of debts is appropriate source of guidance and appropriate for application in the FSM and in this case when assessed against a background of pertinent aspects of Micronesian society and culture for issues unresolved by statutes, decisions of the FSM constitutional courts, or by FSM custom or tradition. *Id.* at 314-15.

duty or obligation to consider custom and tradition *sua sponte*.¹⁰⁶ Although the court has a duty to inquire, the *Semens* court indicated that the level of traditional or customary law inquiry is reduced if the business activity is not local or traditional in nature and the place of employment itself is markedly non-local or international in character.¹⁰⁷

Under the facts and circumstances of that particular case, the *Semens* court stated that the court did not need to conduct an intense search for applicable custom or traditional rules if none had been asserted by the parties.¹⁰⁸ However, if the activity is local or traditional in nature, the *Semens* court indicated that customary law and traditional rights are *so* significant in the decision making process that a court must raise the issue on its own initiative, even if it has not been raised by those involved in the litigation.¹⁰⁹

Lastly, the court observed that the Judicial Guidance Clause¹¹⁰ requires the imposition of a “reasonably intelligent Micronesian” standard as opposed to a more objective standard or legal principle utilized in the international business community. The legal standard crafted by the *Semens* court superficially appears to favor Micronesians over others similarly situated in the international business community. The *Semens* court noted:

A message of the Judicial Guidance Clause is that a court, when interpreting a contract, may not simply assume that reasonably intelligent Micronesians will perceive the same meaning as would reasonably intelligent Americans.... Courts may not blind themselves to pertinent aspects of Micronesian society, such as less facility in the English language, less exposure to business concepts, and the paucity of legal resources, which might cause a reasonably intelligent

¹⁰⁶ *Semens*, 2 FSM Intrm. at 140.

¹⁰⁷ *Id.* See also FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 1 F.S.M.C. § 203.

Micronesian to perceive a meaning differently than would a person from some other nation.¹¹¹

The *Semens* case established the framework in which to resolve a conflict between the Constitution, the statute requiring imposition of the common law of contract in the United States and traditional rights, which have been cited numerous times in other Micronesian cases. However, because the activity involved in *Semen's* was not traditional or local in nature, the court was able to circumvent such a conflict.

The court was not able to avoid conflict between the substantive law and local customary or traditional law in *Etscheit v Adams*,¹¹² which is a second case of significant anthropological import. The trial court decision in *Etscheit* addresses a number of contract issues such as conditions precedent, unjust enrichment and implied contracts, but here, it is noteworthy to discuss the case for its anthropological value.

The *Etscheit* case is anthropologically significant because conflict arises between the German rule of primogeniture and local customary law. Primogeniture requires property to pass to the first-born son, despite writings or wills indicating otherwise. The controversy explored how the German rule of primogeniture was subsequently treated by the Japanese and Americans, and tested the power of local customary or traditional law surfaced by a 1903 land purchase.

This case is a time capsule of Micronesian history over the last 100 years. The *Etscheit* case highlights the anthropological and substantive law issues,

¹¹¹ *Semens*, 2 FSM Intrm. at 149.

¹¹² *Etscheit v. Adams*, 6 FSM Intrm. 365 (Pon. 1994), *rev'd on other grounds*, 6 FSM Intrm. 580 (App. 1994).

which span the German, Japanese, and American occupations of Micronesia. The *Etscheit* court was required to address these issues as they relate to each period of occupation. This case is a microcosm that synthesizes some of the historical impact of colonial influences of the German, Japanese, and American occupations in the region. Ultimately, the court concludes, that local or customary law, which is superior under the constitution, is inconsistent with the German rule of primogeniture.

Dominique Etscheit purchased land in Pohnpei from the German Government at a public auction in 1903. The deed did not contain any limitations on alienation. In 1911, the German Government implemented land reforms over a three-year period in which all deeds from the German Government contained a primogeniture provision restricting transfer of property to the first-born son, which was consistent with German law at the time. These land reforms ended in 1914 when the Japanese took control of the islands. In 1919, the Japanese Government, which then controlled the islands, seized the Etscheit property in a forced sale. Dominique died in 1925 leaving a will naming his wife, Florentine, as his sole heir and indicated that she could freely dispose of the estate, but that when Florentine died all of her land still in existence and was to be distributed among his five children, with one son receiving a double share because he was blind.

In 1927, two years after Dominique died, the Japanese Government returned the property it had seized in the forced sale to the bereaved family of Dominic Etscheit on behalf of "Flore Etscheit." During World War II, the land was again confiscated by the Japanese only to be once again returned in 1957 by the Trust Territory Government to Florentine Etscheit.

In 1956, before the land had been officially returned in 1957 by the Trust Territory, Florentine quit claimed the property to her five children without specifying portions. Florentine died in 1973 leaving no will. Ultimately, there was a dispute among the surviving heirs as to their rights to the property.

Plaintiffs in *Etscheit* sought summary judgment based upon the German law of primogeniture contained in all German deeds, citing examples of Japanese enforcement of the 1911 German deed restrictions and case law from the Trust Territory, which enforced the German rule of primogeniture. The defendants sought summary judgment dismissing this claim. They argued that the German rule of primogeniture was not applicable to the *Etscheit* land because such a restriction was not expressly contained in the 1903 deed for the property.

Citing and employing the framework established in *Semens v. Continental Airlines*, the *Etscheit* court reviewed in length the rules of primogeniture imposed in German deeds. Next, the court reviewed Japanese and American treatment (or lack of treatment) of the German deed restrictions limiting transfer of land to the eldest son despite contrary terms in contract or in one's will.¹¹³ The *Etscheit* court noted that after the formal recognition of Japan's mandate in 1920, the Japanese disregarded the German Land Title Code almost totally. It was found that the Japanese even recognized the rights of females to hold title to land, which was a significant cultural divergence from the German rule of primogeniture and did not adhere to the inheritance patterns recognized by the Germans.¹¹⁴

¹¹³ *Id.* at 373-81.

¹¹⁴ *Id.* at 376-77.

The court noted that when applied by the Japanese and Americans, the German rule of primogeniture was limited only to those instances where the rule was expressly included in the deed. After its lengthy review of the inconsistent application of rule of patrilineal primogeniture under German, Japanese, and American occupations, the *Etscheit* trial court concluded that the German rule of primogeniture was inconsistent the with customary Pohnpeian title system which permitted women to own land and was primarily matrilineal.¹¹⁵

An interesting aspect of the *Etscheit* decision was the court's reliance upon anthropological research in reaching its decision in this case. Citing District Anthropologist John Fischer's reports, the *Etscheit* court observed that there was difficulty with anthropological assimilation of the German rule of primogeniture:

The German rule of primogeniture appears to be inconsistent with the customary Pohnpeian title system, which not only permitted women to own land, but which was according to Fischer, 'primarily matrilineal....' Fischer notes: '[Primogeniture] appears to have been chosen on some purely theoretical basis without much study of the social system of the Ponapeans. According to the older Ponapeans the inheritance provisions caused much contention while the society was adjusting to them....' Given this, the primogeniture provisions on the standard form German deeds should be given narrow application under the FSM Constitution Article XI, Section 11, which states that decisions of this Court should be consistent with local custom. Certainly, this Court will not apply the primogeniture restrictions more broadly than the Germans, Japanese, and Trust Territory governments did.¹¹⁶

The *Etscheit* court also expressed cultural concerns that the rule of primogeniture was discriminatory; it allowed only men to inherit and discriminated against younger male offspring by allowing only the eldest to inherit. The court observed that the rule of primogeniture was also inconsistent

¹¹⁵ *Id.* at 381. In reaching this conclusion, the *Adams* trial court referred to two studies written by John L. Fischer who was District Anthropologist for Pohnpei during the Trust Territory period. *Id.* The Trust Territory government published one version of Fischer's LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS in 1951 and a second version in 1958, which are virtually identical. *Id.* at 394 note 7, note 8.

¹¹⁶ *Id.*

with principles of fairness evident in the FSM and the FSM Equal Protection Clause.¹¹⁷ For these reasons, the *Etscheit* trial court denied the Plaintiffs' motion for summary judgment on the issue of primogeniture and granted summary judgment to defendants on the issue.¹¹⁸

Another significant anthropological issue of *Etscheit* involved a counter-claim based upon the substantive property law concept of adverse possession.¹¹⁹ Plaintiffs sought to dismiss Defendant's claim to the land at issue under a theory of adverse possession. Although adverse possession was recognized under the former American Trust Territory, plaintiffs argued that adverse possession is not fully recognized in Pohnpei. Furthermore, plaintiffs argued that adverse possession should not be applied because of varying rules of land ownership that existed during the various colonial administrations, and because it was contrary to Pohnpeian customs that encouraged landowners to allow others to work on their land.¹²⁰ Although the trial court did not set aside the prior Trust Territory cases, particularly in a case where the defendants did not factually meet the 20-year requirement for adverse possession, the *Etscheit* court did express cultural reluctance to adopt the foreign concept of adverse possession especially when involving family. The court noted:

However, the Court believes that, to the contrary, the defendants' rule is the inequitable one. Under the defendants' rule landowners who, in keeping with Pohnpeian custom, see *Pohnpei Public Lands Bd. Of Trustees v. Yeneres*, PCA No. 31-90, Order (Pon. Sup. Ct. March 3, 1992), did not object to others making use of their land for living or farming could be penalized by having their land taken

¹¹⁷ *Id.* at 381. MICR. CONST., art. IV, § 4.

¹¹⁸ *Etscheit*, 6 FSM Intrm. at 382.

¹¹⁹ *Id.* at 389-90.

¹²⁰ *Id.* The plaintiffs relied on *Pohnpei Public Lands Bd. Of Trustees v. Yeneres*, PCA No. 31-90, Order (Pon. Sup. Ct. March 3, 1992), in support of their position.

from them, even if during most of the period there was no way of knowing that such generosity could be used against them.¹²¹

The *Etschreit* case is an example of the implementation of the constitutional framework created by *Semens* to resolve the conflict between foreign legal concepts and local custom and traditional rights. *Etschreit* differs from the *Semens* case in that traditional rights and local custom apply and ultimately prevail over foreign legal concepts.

C. REPUBLIC OF PALAU

In Palau, Article V, § 2 of the Palau Constitution recognizes the existence of traditional rights or customary law, and emphasizes that customary law may, in some circumstances, be superior to statute.¹²² Where traditional or customary law conflict with the rule of judicial decision statute that requires the Palau courts to apply the *Restatement (Second) of Contracts*,¹²³ the Constitution mandates that traditional law and customary rights are superior. It states:

Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.¹²⁴

The difficulty in application of this “equally authoritative” standard is that it establishes the potential for deadlock when assessing priority between statute and traditional law. However, the second sentence of Article V clearly delineates that traditional law is superior to statutory law in the event of conflict. Consequently, where traditional rights conflict with a statute mandating

¹²¹ *Id.* at 390.

¹²² CONSTITUTION OF THE REPUBLIC OF PALAU art. V, § 2 (1979).

¹²³ 1 P.N.C. § 303.

¹²⁴ CONSTITUTION OF THE REPUBLIC OF PALAU. art. V, § 2.

application of the *Restatement (Second) of Contracts*, traditional law prevails under the Constitution.

VIII. INTERNATIONAL CONTRACT STANDARDS AND MODEL LEGISLATION¹²⁵

There have been a number of efforts to unify contract law, particularly with respect to the sale of goods on a national and international level with the adoption of such standards as the English Sale of Goods Act, the Uniform Commercial Code, the Revised Uniform Commercial Code, the United Nations Sales Convention and the UNCITRAL Model for E-Commerce, and the *UNIDROIT* Principles of Contract Law. These model rules are intended to unify law governing commercial transaction and to expedite commercial practice. The rules do not replace common law rules of contract law or equity or those principles recognized under custom or traditional rights.

This text will also examine significant provisions in the United Nations Sales Convention (CISG) and UNCITRAL Model for E-Commerce because Micronesia and the Republics of the Marshall Islands and Palau are members of the United Nations even though they have not yet adopted this Model Law or ratified this Convention to date. Because these nations are member nations and the potential for future adoption exists, these model laws will be reviewed in this text and compared to existing regional contract and sales law. An additional reason for CISG inclusion is that the United States Pacific territories, state, and

¹²⁵ The historical background contained in the following section is a summary of a more extensive treatment which can be found in numerous sources including MURPHY, SPEIDEL & AYERS, *STUDIES IN CONTRACT LAW*, 6th ed. (Foundation Press 2003); CALAMARI & PERILLO, *CALAMARI AND PERILLO ON CONTRACTS*, 5th ed. (West 2003); FARNSWORTH, YOUNG & SANGER, *CONTRACTS CASES AND MATERIALS*, 6th ed. University Casebook Series, (Foundation Press 2001); and in E. ALLEN FARNSWORTH & WILLIAM YOUNG, *SELECTIONS FOR CONTRACTS*, (Foundation Press 2003). As an aside, Professor Farnsworth was a Reporter for the *RESTATEMENT (SECOND) OF CONTRACTS*.

other regional trade partners have adopted the UN Sales Convention governing international contracts for the sale of goods between member nations.

Because these Northern Pacific jurisdictions heavily rely upon the common law of contract and sales from the United States (and the common law of the United States is influenced or codified by the Uniform Commercial Code, the Revised Uniform Commercial Code, and the *Restatement (Second) of Contracts*) this text will also address and include those rules to the extent they influence regional contract and sales law in the Northern Pacific. Additionally, for purposes of obtaining a better understanding of the interrelationship of these international standards to the common law of contracts and contract and sales law of the Northern Pacific region, a brief historical background for each of these international standards, model rules or legislation is provided.

A. UNIFORM COMMERCIAL CODE

Efforts to develop the Uniform Commercial Code began in the United States shortly after England adopted its Sale of Goods Act governing the law of sales in 1893.¹²⁶ The adoption of this act in England was soon followed by adoption of the act in the colonies and territories which were part of the British Empire at the time including those islands in the Pacific region.

In the United States, the National Conference of Commissioners for Uniform State Laws responded to the promulgation of the English Sale of Goods Act by assigning the task of producing a comparable statute to Professor Samuel Williston. The result of Professor Williston's efforts was the Uniform Sales Act which was produced in 1906 and ultimately adopted by thirty states. Professor

¹²⁶ English Sale of Goods Act, 56 & 57 Vict., c. 71 (1893).

Williston also served as the Reporter for the first *Restatement of Contracts*, which was later published in 1932.

Both the English Sale of Goods Act and the Uniform Sales Act were good first efforts but deficient because they failed to adequately address problems arising out of the sale of goods where the common law still controlled. Over the next fifty years, a number of additional attempts were made to revise, amend or replace the Uniform Sales Act in the United States.¹²⁷ In 1945, the American Law Institute ultimately combined its efforts with the National Conference of Commissioners for Uniform State Laws to draft the Uniform Commercial Code (UCC), which was ultimately completed in 1952.

Professor Karl Llewellyn was Chief Reporter of the UCC, and was assisted in this task by Soia Mentschikoff as Associate Chief Reporter. Pennsylvania was the first state to adopt the UCC in April 1953 with an effective date of July 1, 1953. By 1961, thirteen states had adopted the 1958 version of the UCC.

In 1961, a Permanent Editorial Board was established which adopted further revisions into the 1962 Official Text of the UCC. Except for Louisiana and the District of Columbia, this version has ultimately been adopted by all states in the United States including the State of Hawaii.¹²⁸ In the Northern Pacific region, Guam¹²⁹ and the Commonwealth of the Northern Mariana Islands¹³⁰ have also adopted identical versions of the Uniform Commercial Code. For simplicity

¹²⁷ For example, a Federal Sales Act was proposed in Congress in 1940 but the National Conference of Commissioners on Uniform State Laws successfully lobbied for its postponement.

¹²⁸ Hawaii adopted the U.C.C. effective January 1, 1967 and Hawaii's version can be found at HAW. REV. STAT. §§ 490-10.

¹²⁹ Guam adopted the U.C.C. with an effective date of January 1, 1977 and can be found at GUAM CODE ANN., tit. XIII, §§ 10-101. (2007).

¹³⁰ The Uniform Commercial Code adopted by the Mariana Islands can be found at 5 C.M.C. § 1101.

sake, this text will cite the general UCC provision instead of each individual state or territory's statutory number.

The Federated States of Micronesia has statutorily adopted only a part of the UCC applicable in the United States and its territories (except American Samoa). Specifically, Micronesia has adopted a rudimentary and truncated version of UCC Article 9 applicable to Secured Transactions, Sales of Accounts and Chattel Paper, that does not provide a vehicle for recording those security interests and has reserved those sections which would have been equivalent to Article 2 addressing Sales.¹³¹ Palau has not adopted the UCC or its equivalent. In lieu of the UCC, the Republic of the Marshall Islands has adopted the Sale of Goods Act of 1986 which is virtually identical to the English Sale of Goods Act of 1893.¹³² Lastly, American Samoa has its own abbreviated Commercial Code, which is unlike any other in the region.

The UCC continues to be revised, most recently in 2003 when revisions to Articles 1 and 2 were approved. The 2003 revisions to Article 1 and Article 2 make three primary changes: (1) the adoption of gender neutral language to replace the pronoun "he" which was prevalent in prior versions, (2) replacement of the word "writing" with the term "record" in order to reflect the development and accommodate e-commerce, and (3) adoption of several enhanced consumer protection provisions. Although Hawaii, Guam, and the Commonwealth of Northern Mariana Islands have adopted the UCC they have not yet adopted the most recent 2003 revisions.

¹³¹ See generally 33 F.S.M.C. § 901.

¹³² English Sale of Goods Act, 56 & 57 Vict., c. 71 (1893).

The primary objective of the UCC in the United States is to complement the common law. It provides a statutory text, which includes many of the rules relating to the sale of goods omitted by the Sale of Goods Act and Uniform Sales Act, which had been left largely to the common law. Where it has been legislatively adopted, the UCC has generally supplanted the common law of contract and sales and has the force of law in those states in the United States, including Hawaii and territories such as Guam and the Northern Mariana Islands, which have adopted it statutorily.

B. UN SALES CONVENTION

The United Nations Sales Convention for the Sale of International Goods of 1980 (CISG) is the international equivalent of the UCC and governs contracts for the international sale of goods between entities or individuals of member nations that are signatories.¹³³ Under CISG, the parties have freedom to negotiate, exclude, or vary from its provisions.¹³⁴ In addition to recognizing freedom to negotiate and contract, CISG, more importantly, does not displace rules of national common law or statute that relate to “the validity of the contract or of any of its provisions or of any usages.”¹³⁵ For example, the UCC would still

¹³³ United Nations Convention on Contracts for the International Sale of Goods, art. 1, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (1980); 19 I.L.M. 668(1980); 1489 U.N.T.S. 3, 59;S. Treaty Doc. 98-9(1983), [hereinafter *CISG*]. For a more detailed treatment of CISG, see United Nations Commission on International Trade, <http://www.uncitral.org>, and J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 99 (3d ed. 1999). Further information is available at <http://www.cisg.law.pace.edu>. Another loose leaf database for CISG is entitled “Unilex”. The specific provisions of CISG can also be found on the Internet at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html.

¹³⁴ See CISG, *supra* note 133, art. 6.

¹³⁵ CISG, *supra* note 133, art. 4(a).

apply to internal contractual disputes involving the sale of goods where applicable.

Work on CISG began as early as the 1930's when the Institute for the Unification of Private Law in Rome, under direction of the League of Nations, began work on a uniform law for international sales. This work was disrupted by World War II. After the war, the Dutch Government continued the earlier efforts at drafting international standards governing sales contracts and convened a conference at The Hague in 1964. The end product of this 1964 conference was the approval of a Uniform Law on the International Sale of Goods (ULIS) and a companion uniform law on the formation of international contracts for the sale of goods. Although not adopted by the United States, ULIS was adopted by eight nations giving it effect in international transactions between entities or individuals of those ratifying countries.

During the ratification process of ULIS, the United Nations renewed the prior efforts of the League of Nations and the Institute for the Unification of Private Law, which had been interrupted by World War II, creating a United Nations Commission on International Trade Law (UNCITRAL) in 1966. Because of some concerns that member nations like the United States had with certain provisions of ULIS, the intent of UNCITRAL, which is comprised of representatives from thirty-six member nations, was to reconcile and unify international contract and sales law while eliminating any legal barriers to the free flow of trade among member nations. In an effort to accomplish this

objective, UNCITRAL has subsequently convened a number of conventions and also drafted several model laws.¹³⁶

The UNCITRAL Working Group on Sales was created in 1969 to consider making changes to ULIS, in an attempt to make it more acceptable to various civil and common law countries. Over the next 11 years, the Working Group formulated a draft that was ultimately presented at a diplomatic conference in Vienna in 1980. After lengthy negotiation, the sixty-two countries participating in the convention adopted CISG. CISG took effect on January 1, 1988 when signed by 10 member nations.¹³⁷ The intent of the CISG Convention was to establish “a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.”¹³⁸

On October 9, 1986, the United States Senate ratified CISG upon the request of the President. Since January 1, 1988, American exporters and importers dealing with trade partners from other signatory member nations have been subject to terms of CISG.

¹³⁶ Convention on the Limitation Period in the International Sale of Goods, concluded at New York on June 14, 1974, as amended by the Protocol of April 11, 1980, 1511 UNTS 3, 13 ILM 952 (1974); CISG; United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 UNTS 3, U.N. Doc. A/CONF.89/13; United Nations Convention on International Bills of Exchange and International Promissory Notes, Dec. 9, 1988, 28 ILM 177; United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, April 19, 1991, U.N. Doc. A/CONF. 152/13 annex; United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, G.A. Res. 50/48, U.N. Doc. A/RES/50/48; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 3 U.S.T. 2517, 330 U.N.T.S. 38; *UNCITRAL* Model Law on International Commercial Arbitration, June 21, 1985, U.N. Doc. A/40/17, annex I; *UNCITRAL* Model Law on International Credit Transfers, May 15, 1992; *UNCITRAL* Model Law on Procurement of Goods, Construction and Services, June 15, 1994; *UNCITRAL* Model Law on Electronic Commerce, June 12, 1996, U.N. Doc. A/RES/51/162; *UNCITRAL* Model Law on Cross-Border Insolvency, May 30, 1997; and the *UNCITRAL* Model Law on Electronic Signatures, July 5, 2001. See http://www.uncitral.org/uncitral/en/uncitral_texts.html.

¹³⁷ See <http://www.uncitral.org/english/texts/sales/salesindex.htm>.

¹³⁸ See *Id.*

As of April 2004, approximately sixty-three member nations have ratified CISG including China, Australia, New Zealand, and the United States, which are all major trade export and import partners in the Northern Pacific region.¹³⁹ However, Japan, which is also one of the major trade export and import partners in the region, has yet to ratify the CISG. Additionally, the Republic of the Marshall Islands, the Federated States of Micronesia, the Republic of Palau, the United Kingdom and many other member nations also have not yet ratified CISG. At a recent conference in Majuro, RMI,¹⁴⁰ Chief Justice Yosiwo George of the Kosrae State Court (who served as United Nations Ambassador for the FSM from 1992 to 1995) noted that many of the countries that ratified CISG did so before the FSM, the Republic of Palau, and the Republic of the Marshall Islands became member nations in the early to mid 1990's, and that the failure of these island nations to adopt CISG can be attributed to benign neglect. The possibility of future adoption of CISG for enhanced international trade practice is certainly noteworthy.

C. UNCITRAL MODEL FOR E-COMMERCE

In addition to CISG, UNCITRAL has published a number of Model Laws to facilitate international trade including the Model Law on Electronic

¹³⁹ As of December 2009, the list of CISG ratifying countries: Argentina, Australia, Austria, Belarus, Belgium, Bosnia/Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Columbia, Croatia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, St. Vincent and the Grenadines, Serbia/Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Venezuela, and Zambia. For information on ratification, accession, approval, acceptance, succession, and entry into force dates, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

¹⁴⁰ Pacific Islands Legal Institute, Majuro, Marshall Islands, February 7 -11, 2005.

Commerce, which was introduced in 1996.¹⁴¹ As the use of e-commerce expands, UNCITRAL advocated for the establishment of procedural rules and regulations which may be promulgated by the adopting country or state. As internet use and e-commerce expands in the Pacific Island region, these model laws may be increasingly beneficial to the region due to its geographic isolation and would potentially facilitate and promote commerce.

Further, a number of trade partners of the Northern Pacific region have adopted legislation implementing the Model Law on Electronic Commerce including Australia in 1999, the Philippines in 2000, and New Zealand in 2002. Many individual states, provinces, bailiwicks, and territories have also adopted legislation equivalent to the Model Law on Electronic Commerce.¹⁴²

¹⁴¹ G.A. Res. 51/162, U.N. Doc. A/Res/51/162 (Jan. 30, 1997). An additional Article 5 was adopted in 1998. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html.

¹⁴² The UNCITRAL website indicates that as of April 2004, legislation implementing the Model Law on Electronic Commerce has been adopted in Australia, Columbia, Dominican Republic, Ecuador, France, India, Ireland, Jordan, Mauritius, Mexico, New Zealand, Pakistan, Panama, Philippines, Republic of Korea, Singapore, Slovenia, South Africa, Thailand, and Venezuela. The Model Law has been adopted in a number of individual bailiwicks and territories such as the Bailiwick of Guernsey, Bailiwick of Jersey, the Isle of Man, all Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland, in Bermuda, Cayman Islands, the Turks and Caicos Islands, the overseas territories of the United Kingdom of Great Britain and Northern Ireland, and in the Hong Kong Special Administrative Region of China. The Uniform Law Conference of Canada prepared the Uniform Electronic Commerce Act in 1999 based upon the Model Law, which has subsequently been adopted in a number of provinces and territories including British Columbia, Manitoba, New Brunswick, New Foundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, the Yukon, and the Province of Quebec. In the United States, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Electronic Transaction Act in 1999 based on the Model Law and which has been adopted by Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wyoming, and the District of Columbia. Illinois adopted the Model Law in 1998. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html.

The Model Code is divided into two parts. The first part addresses issues of e-commerce generally. The second part is intended to address specific areas of e-commerce but currently only addresses carriage of goods and transport documents.

The intent of the Model Law is:

[T]o facilitate the use of modern means of communication and storage of information, such as electronic data interchange (EDI), electronic mail and telecopy, with or without the use of such support as the Internet. It is based on the establishment of a functional equivalent for paper-based concepts such as 'writing', 'signature', and 'original'. By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. In addition to general norms, the Model Law also contains rules for electronic commerce in specific areas, such as carriage of goods. With a view to assisting executive branches of Governments, legislative bodies, and courts in enacting and interpreting the Model Law, the Commission has produced a Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.¹⁴³

Although the Marshall Islands,¹⁴⁴ the Federated States of Micronesia,¹⁴⁵ and Palau¹⁴⁶ are member nations of the United Nations, there has been no effort to adopt either CISG or the Model Law on Electronic Commerce in the region. The Model Law for E-Commerce may be a significant economic development tool and of future interest to member island nations such as Micronesia, the Marshall Islands, and Palau. As internet use increases in the region, the geographic realities of isolation, and the full effects of e-commerce begin to have an impact in these countries. There will be either pressure to adopt the Model Code legislatively or, alternatively, the judiciary will be forced to take an ad hoc

¹⁴³ See The UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html.

¹⁴⁴ The Republic of the Marshall Islands became a member nation of the United Nations on September 17, 1991.

¹⁴⁵ The Federated States of Micronesia became a member nation of the United Nations on September 17, 1991.

¹⁴⁶ The Republic of Palau became a member nation of the United Nations on December 15, 1994.

common law approach in a case by case analysis basis to address the substantive issues addressed by the Model Code. In that event, the Model Code may still be effective in serving as a reference tool for conflict resolution.

In 2001, the United Nations also adopted a resolution promoting the adoption of the Model Law on Electronic Signatures¹⁴⁷ which is intended to supplement Article 7 of the Model Law on E-Commerce by establishing a presumption that electronic signatures shall be treated the same as hand written signatures if they meet certain criteria of technical reliability.¹⁴⁸ In response to such efforts as the UNCITRAL Model Rules, the Revised Uniform Commercial Code, which is widely utilized in the United States, has taken similar steps to facilitate e-commerce by modifying original provisions by changing the “writing” requirement to a “record” requirement and by adding new provisions that particularly address the sale of goods through e-commerce.¹⁴⁹ As noted previously, a number of states in the United States, however, have legislatively adopted the equivalent to the Model Rules for E-Commerce and the necessity of adopting the Revised UCC has been minimized and would be potentially redundant at this point.

¹⁴⁷ G.A. Res. 56/80, U.N. Doc. A/Res/56/80 (Jan. 24, 2002). The text of the Model Law on Electronic Signatures can be found at the UNCITRAL website, <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

¹⁴⁸ G.A. Res. 51/162, U.N. Doc. A/Res/51/162 (Jan. 30, 1997).

¹⁴⁹ For example, Revised U.C.C. § 1-201(31) defines “Record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. The authors of the Revised UCC also add additional provisions after U.C.C. § 2-313. These new U.C.C. provisions are entitled: U.C.C. § 2-313A “Obligation to Remote Purchaser created by Record Packaged with or Accompanying Goods” and U.C.C. § 2-313B “Obligation to Remote Purchaser created by Communication to the Public.” These new provision are intended to extend seller’s warranty to “records” sent through e-commerce. *See also* UNCITRAL Model for E-Commerce, art. 6, § 1 which provides: “Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.”

D. RESTATEMENT (SECOND) OF CONTRACTS

The first *Restatement of Contracts* was published in 1932 by the American Law Institute, which was formed in 1923. Professor Williston, author of the earlier Uniform Sales Act, was the Reporter responsible for preparing the drafts. A few decades later, in 1962, the American Law Institute began its efforts in preparation of a *Restatement (Second) of Contracts*. The Reporters for the *Restatement (Second) of Contracts* were Professor Robert Braucher and Professor E. Allen Farnsworth, who completed the task in 1980. The *Restatements* are intended to set forth black letter rules or general principles of contract law with supporting authority, comments, or examples. The *Restatements* generally do not have the force of statute or law¹⁵⁰ and serve as “common law ‘persuasive authority’ with a high degree of persuasion.”¹⁵¹

Although utilized predominantly as persuasive authority in the United States and its territories, the Republics of Palau, the Marshall Islands (until January 1, 1989), and the Federated States of Micronesia have elevated its status. These islands are required by statutory rules of decision to employ the *Restatement (Second) of Contracts*, when applicable, as persuasive authority in case law.¹⁵²

¹⁵⁰ An exception is the Virgin Islands Code which provides that “The rules of the common law, as expressed in the restatements of law approved by the American Law Institute . . . , shall be the rules of decision . . . in cases to which they apply, in absence of local laws to the contrary.” V.I. CODE ANN. tit. 1, § 4.

¹⁵¹ JUDGE HERBERT GOODRICH, RESTATEMENT AND CODIFICATION, *David D. Field Centenary Essays* 241, 244-45 (1949). See also, *Brewer v. Erwin*, 600 P.2d 398, 410 n.12 (Or. 1979) (a recent Oregon Supreme Court case distinguishing between Restatement and statutory authority).

¹⁵² There are numerous cases from the Northern Pacific jurisdictions, which this text will include and will specifically cite and rely upon particular provisions of the RESTATEMENT (SECOND) OF CONTRACTS (1979). The text will include those significant cases and provisions of the RESTATEMENT (SECOND) OF CONTRACTS (1979). In a recent conversation, Associate Chief Justice Alexandro Castro indicated that the Restatement and its minority or developing trends are

There is some irony in the fact that the legal realists and anthropologists like Llewellyn (who drafted the *Restatements*) were concerned with local practice. However, the rule of decision statutes requiring application of the *Restatements* in Palau, Micronesia, and formerly in the Marshall Islands, is mandated and appears to supplant local practice. To the extent that they do not conflict with local custom or tradition, the rule of decision statutes appease concerns of the legal realists and anthropologists; however, one wonders whether this is what the legal realists envisioned when drafting the *Restatements*.

The statutory adoption of the Uniform Commercial Code and the promulgation of state and federal consumer protection acts in the United States arguably supplant and minimize the necessity of the *Restatements*, the *Restatement (Second) of Contracts*, and the common law of contract. However, there are many who argue that the *Restatements* and the common law continue to have independent significance.¹⁵³ This is particularly true since many contracts are non-goods contracts, such as contracts for personal services and construction contracts, where the *Restatement* would continue to play a critical role in determining formation, interpretation, and enforcement.

sometimes preferred in the islands because they are a better fit for the islands than the more urban mainland. Interview with Alexandro Castro, Assoc. C.J. of Commonwealth of the Northern Mariana Islands, Pacific Judicial Conference, Palau (June 8-10, 2005).

¹⁵³ For example, Professor Braucher states: “The effort to restate the law of contracts in modern terms highlights the reliance of private autonomy in an era of expanding government activity. . . . Freedom of contract, refined and redefined in response to social change, has power as it always had.” Robert Braucher, *Formation of Contract and the Second Restatement*, 78 YALE L.J. 598, 615-16 (1969).

E. UNIDROIT PRINCIPLES OF CONTRACT LAW

Based in Rome, the International Institute for the Unification of Private Law (UNIDROIT) was founded in 1926 under charter of the League of Nations. It began work on drafting international standards governing sales, but was interrupted by World War II. UNIDROIT began work on the Principles of International Commercial Contracts in 1971 and these Principles were ultimately published in 1994.¹⁵⁴

The UNIDROIT Principles draw from many sources of contract and sales law including CISG, the UCC, the *Restatement (Second) of Contracts*, and generally recognized principles of civil law and common law systems. The relationship between the UNIDROIT Principles of Contract Law and CISG is similar to the relationship between the UCC and the *Restatement (Second) of Contracts*. The UNIDROIT Principles are comparable, in effect, to the *Restatement (Second) of Contracts* because they serve as *persuasive* authority.¹⁵⁵ The UNIDROIT Principles of International Commercial Contracts are intended to serve as a corresponding or supplemental document to the United Nations Sales Convention (CISG) but do not have the force of law.¹⁵⁶

The UNIDROIT Principles parallel CISG in many respects, but are broader in scope than CISG in the areas of pre-contractual liability, excuse for

¹⁵⁴ For a general discussion of the development of the UNIDROIT Principles, see FARNSWORTH & YOUNG, *SELECTIONS FOR CONTRACTS*, (Foundation Press 2003); E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS*, Section 1.8a (2d ed. 1998); and BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (3d ed. 1997).

¹⁵⁵ Except in those jurisdictions like Palau and the FSM where the *Restatements* have been statutorily elevated to rules of decision.

¹⁵⁶ For a general discussion of the UNIDROIT Principles, see JOSEPH PERILLO, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and Review*, 63 *FORDHAM L. REV.* 281 (1994).

nonperformance based on hardship, specific performance, and liquidated or stipulated damages. The UNIDROIT Principles also differ from CISG in that the UNIDROIT Principles recognize concepts such as freedom of contract,¹⁵⁷ enforcement or observation of contract,¹⁵⁸ fairness,¹⁵⁹ and good faith.¹⁶⁰

The UNIDROIT Principles are not only broader in scope than CISG, but also in application of CISG, which is narrowly limited to the international sale of goods. While CISG is limited to the international sale of goods, the UNIDROIT Principles are more relevant in resolving disputes arising under international service or other international contracts.

CONCLUSION

Two important developments have been noted in this text: 1) the American Law Institute's *Restatement of Law* has been elevated from persuasive authority to a statutory rule of decision in some of these Pacific island nations, and 2) the anthropological implications of local custom and traditional rights on substantive contract and sales law have resulted in a unique regional amalgam. Still, contract and sales law in the Northern Pacific region has yet to develop its own identity and is in a state of transition as these societies move from status based relationships to relationships based on contract. Anthropologically, the region is a mix of assimilation and conflict, which creates a unique amalgam of contract and sales law.

As Llewellyn and Hoebel have observed:

¹⁵⁷ UNIDROIT Principles of International Commercial Contracts (2004) Art. 1.1 and 1.5.

¹⁵⁸ UNIDROIT Principles Art. 6.2.1.

¹⁵⁹ UNIDROIT Principles Art. 3.10 and 2.20.

¹⁶⁰ UNIDROIT Principles Article 1.7.

Insofar as the system is an integrated part of the web of social norms developed within a society's culture (with due exception for imposition by some organized minority force) it will be accepted as a parcel of habit-conduct patterns in the social heritage of the people.¹⁶¹

As noted by Donovan and Anderson, the “[l]aw, in order to achieve its goal of justice and social order, requires the theoretical grounding and empirical conclusions of anthropology.”¹⁶²

In the Northern Pacific Region, contractual based relationships are interpreted and enforced by foreign, externally imposed international standards. These standards are, for the most part, applied by foreign born or foreign trained judges applying international standards of contract and sales law, such as the *Restatement (Second) of Contracts* and the Anglo-American common law tradition of contract and sales law.

It appears from judicial decisions that these foreign standards are consistent with or have begun to successfully integrate into the web of social norms developed within the Northern Pacific culture and are blending into the social heritage of the people.

Ultimately, the Northern Pacific region appears to be trending toward cultural assimilation of Anglo-American concepts of contract and sales law. Hawaii, Guam, and the Commonwealth of the Northern Mariana Islands have (to the greatest extent) anthropologically assimilated Anglo-American concepts of contract and sales law and have supplanted the common law of contracts with the adoption of the Uniform Commercial Code governing contracts for the sale of goods. American Samoa, the southern most and only territory of the United States below the equator, has an abbreviated commercial code, applies case law

¹⁶¹ LLEWELLYN & HOEBEL, *supra* note 94, at 239.

¹⁶² DONOVAN & ANDERSON, *ANTHROPOLOGY & LAW*, *supra* note 92, at 2.

from the United States in contract and sales disputes, but clings to vestiges of local traditional rights or customary law. Because the United States is a signatory to the UN Sales Convention, international contractual disputes between commercial entities in these American states, territories, and commercial entities in other UN member nations are governed under the terms of the UN Sales Convention if the commercial entities are in member nations who are also signatories. Conversely, the Marshall Islands have statutorily omitted the American Law Institute's *Restatement (Second) of Contracts* from their rule of decision statutes. Micronesia has adopted Article 9 of the UCC but has reserved Article 2 in the Uniform Commercial Code. Consequently, contractual disputes in Micronesia, particularly those involving the sale of goods, are governed by the *Restatement* and the common law. Contractual disputes in the Marshall Islands would be governed by the common law and the English Sale of Goods Act, which was adopted by the Marshall Islands in 1986.

Traditional rights or custom and tradition remain a significant factor in assessing issues arising in contract formation, interpretation, enforcement, and breach in the Marshall Islands, Micronesia, Palau, and in the American territories and protectorates. In many cases, judges of the Northern Pacific region unwittingly integrate traditional and customary law and contract and sales law giving it a unique local character.

In these island nations, socio-cultural relationships are still governed primarily by customary and traditional law, but it is clear that these relationships are being influenced by foreign concepts of traditional contract and sales law. As these countries transition from a society based on tradition to one based on contract, they have retained the right to apply traditional rights or customary

law. Under their constitutions or rule of decision statutes, traditional rights and customary law are superior to the common law of contract and sales in the event of conflict. However, these island nations recognize the value of anthropological assimilation despite language in some cases that they will not “slavishly” follow Anglo-American precedent. As it relates to contract and sales law, these island nations are at the same time making significant efforts, as noted in the *Semens*¹⁶³ decision, to adopt or assimilate the rule of law recognizing uniform international contract and sales standards facilitating trade and commerce to attract international investments. As blatantly stated by the FSM court in *Semens*, there are several significant reasons for this anthropological assimilation:

‘Common law’ is a label identifying a widespread historical legal process tracing its origins back to medieval England. This is a trial and error process in that common law judges base current decisions upon earlier precedents but, where those precedents are at odds with current accepted notions of social justice, the judges are free to modify or overrule earlier precedent. This system is now employed by numerous independent sovereignties throughout the world including Great Britain, the United States, India, and nations in Africa and throughout the Pacific. *Alaphonso v. FSM*, 1 FSM Intrm 209,220 (App. 1982). By linking ours to that long-established and widely used system of justice, we draw on the experience insights and improvements gained through hundreds of years of application in numerous cultural contexts. Moreover, our system of justice thereby becomes more recognizable and predictable. Hence, it is more familiar to other nations in this part of the world and less threatening to potential investors. This in turn creates a better climate for economic development, an important goal of this new nation.¹⁶⁴

¹⁶³ *Semens*, 2 FSM Intrm. 131, 141-42 (Pon. 1985).

¹⁶⁴ *Id.*