

# 608 International Contracting Update for Energy Counsel

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## Faculty Biographies

### **William A. Bower**

William A. Bower is a general attorney employed in the Legal Services Department of Solar Turbines Incorporated for nearly 20 years. Solar is a wholly owned subsidiary of Caterpillar Inc., and is the world's foremost producer of mid-range industrial gas turbine engines and turbomachinery power packages used by customers in more than 80 nations to produce, process, and transport vital energy resources such as oil and natural gas and for generating electricity to power industrial processes and facilities.

Mr. Bower has served previously as an Assistant U.S. Attorney, Southern District of California, and as a trial attorney, Tax Division, Civil Section, U.S. Department of Justice. He also served in the U.S. Army for two years.

Mr. Bower is a member of the San Diego County Bar Association, the State Bar of California, and the Washington, DC Bar Association.

Mr. Bower received an AB from California Western University, a JD from California Western University School of Law, and an MLT from Georgetown University School of Law.

### **Edward J. Kania**

Edward J. Kania is a vice president and associate general counsel at OptiGlobe Communications, Inc. based in Washington, DC. His responsibilities include negotiating and drafting various sales agreements, construction agreements, senior loan facilities and vendor supply and financing transactions associated with the construction, development, provisioning, ownership and operation of the company's internet data centers. OptiGlobe is a web hosting company with facilities and operations primarily located in South America.

Prior to joining OptiGlobe, Mr. Kania served for 11 years at Edison Mission Energy, one of the world's largest and premier independent power developers. While at Edison Mission Energy, he served as a corporate vice president and Asia division general counsel and participated as a member of a multidisciplinary management team assessing, implementing, and executing investment, development, and acquisition opportunities. He was extensively involved in negotiating over \$10 billion of complex, large-scale financing and acquisition transactions throughout the world.

Mr. Kania is a member of the California and District of Columbia bars and a former member of the Singapore Academy of Law.

He earned a BA from the Claremont Colleges and is a graduate of the Loyola Law School.

## **Douglas B. Whiting**

Douglas B. Whiting has practiced law as an international and transactional lawyer for 16 years. He is assistant general counsel of The Entergy Power Group based in the Houston area. He manages Entergy's legal support for nonutility power plant asset management issues in North America, South America, Europe, and Asia.

For the first five years of his career, he worked in-house with Southern California Edison Company and its nonutility affiliates. He was one of 12 individuals who started Edison Mission Energy Company, which is now one of the largest nonutility electric power producers in the world. From Mission Energy, he accepted the position as a divisional general counsel in San Diego for a Helsinki-based international conglomerate, A. Ahlstrom Corporation. When his division was bought out by Foster Wheeler Corporation, he managed his division's San Diego offices until he completed their shut-down. He then went into private practice in San Diego where he advised primarily Fortune-500-sized corporations on domestic corporate and transactional matters and international matters relating to the electric power industry and project finance. He also conducted in-house training seminars on international management, cultural, and monetary issues.

Mr. Whiting previously served as chair of ACCA's International Energy Committee.

He obtained his JD and MBA from the University of Utah.

**INTERNATIONAL CONTRACTING UPDATE  
FOR ENERGY COUNSEL  
(COURSE 608)**

**EDWARD J. KANIA**

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Part I. Sphere of application and general provisions

**CHAPTER 1. SPHERE OF APPLICATION**

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

#### Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

#### Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

#### Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

### **CHAPTER II. GENERAL PROVISIONS**

#### Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

#### Article 8

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

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

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the

negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

#### Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

#### Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

#### Article 13

For the purposes of this Convention "writing" includes telegram and telex.

## Part II. Formation of the contract

### Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

### Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

### Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

### Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of



communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

#### Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

#### Article 20

(1) A period of time of acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

#### Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally

informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

#### Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

#### Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

#### Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

### Part III. Sale of goods

#### CHAPTER I. GENERAL PROVISIONS

#### Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

#### Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

#### Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

## Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

## Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

**CHAPTER II. OBLIGATIONS OF THE SELLER**

## Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

## Section I. Delivery of the goods and handing over of documents

## Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;

(c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

## Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by

shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

### Article 33

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

### Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

## Section II. Conformity of the goods and third party claims

### Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

#### Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

#### Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

#### Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

## Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

## Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

## Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

## Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

## Article 43

- (1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.
- (2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

## Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

## Section III. Remedies for breach of contract by the seller

## Article 45

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
  - (a) exercise the rights provided in articles 46 to 52;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

## Article 46

- (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
- (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances.

A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

#### Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:



- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- (b) in respect of any breach other than late delivery, within a reasonable time:
  - (i) after he knew or ought to have known of the breach;
  - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
  - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performances.

#### Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

#### Article 51

- (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.
- (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### Article 52

- (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.
- (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### **CHAPTER III. OBLIGATIONS OF THE BUYER**

#### Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

## Section I. Payment of the price

### Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

### Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

### Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

### Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) at the seller's place of business; or
- (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

### Article 58

(1) If the buyer is not bound to pay the price at any other specific time he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

### Section II. Taking delivery

#### Article 60

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

### Section III. Remedies for breach of contract by the buyer

#### Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

- (a) exercise the rights provided in articles 62 to 65;
- (b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

## Article 63

- (1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
- (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

## Article 64

- (1) The seller may declare the contract avoided:
  - (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed;
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
  - (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
  - (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
    - (i) after the seller knew or ought to have known of the breach; or
    - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

## Article 65

- (1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.
- (2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

## CHAPTER IV. PASSING OF RISK

### Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

### Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

### Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

### Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

### Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

## **CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER**

### Section I. Anticipatory breach and installment contracts

#### Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

#### Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

#### Article 73

(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of

contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.

(2) If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## Section II. Damages

### Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

### Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

### Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

## Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

## Section III. Interest

## Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

## Section IV. Exemption

## Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.



## Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

## Section V. Effects of avoidance

## Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

## Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

## Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

## Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

- (a) if he must make restitution of the goods or part of them; or
- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

## Section VI. Preservation of the goods

## Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

## Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

## Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

## Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

## Part IV. Final provisions

## Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

## Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties, to such agreement.

## Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

## Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

## Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

## Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a

declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### Article 95

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

#### Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

#### Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

## Article 98

No reservations are permitted except those expressly authorized in this Convention.

## Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

## Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

## Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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Changing Contract practices in Ling of the United Nations Sales Convention:  
A Guide for Practitioners. 29 Int'l Law. 525-554 (1995).

## ARTICLES

PETER WINSHIP\*

### Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners

The following materials introduce the United Nations Convention on Contracts for the International Sale of Goods. They (1) describe the Convention in a nutshell, (2) summarize the reasons why attorneys and their clients should know something about the Convention, (3) analyze when the Convention is applicable, and (4) suggest ways to adjust contract forms and contracting practices to take into account the Convention's provisions.

#### I. The U.N. Sales Convention in a Nutshell

The following paragraphs summarize basic attributes of the United Nations Convention on Contracts for the International Sale of Goods (the Convention).<sup>1</sup> All attorneys in the United States should be aware of the substance of these

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This article is adapted from an outline used by the author in presentations to programs sponsored by the American Conference Institute.

1. The official text of the Convention [hereinafter cited as CISG] is published in the *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. Doc. No. A/CONF.97/19 (1981). The U.N.-certified English-language text of the Convention has



paragraphs. The general information they contain should protect against surprise. Later parts of this outline provide some refinements, but an attorney seeking answers to specific legal questions may have to examine the resources noted in paragraph E *infra*.

The U.N. Sales Convention is a multilateral treaty to which the United States and forty-three other countries are parties (i.e., Contracting States). It applies to offers made, and sales contracts concluded, after it enters into force in the relevant Contracting States.<sup>2</sup>

#### A. THE CONVENTION'S SCOPE

The Convention covers (1) the formation of contracts for the international sale of goods, and (2) the rights and obligations of parties to these sales contracts. It expressly excludes from its coverage, however, such important issues as contractual validity, the property consequences of a sales contract, and liability for death caused by a defect in the good sold. Moreover, the Convention only covers sales contracts. It therefore does not govern a number of contracts that are ancillary to an international sales contract: for example, distribution agreements, contracts of carriage and insurance, letters of credit, and dispute resolution clauses.

While the Convention governs (1) *contracts for the sale* (2) of *goods* when (3) the transaction is *international*, the Convention defines only the third of these elements. Location of the parties determines whether the contract is an international transaction within the Convention's scope. As a general rule, a business enterprise located in the United States that proposes to sell or to buy goods from an enterprise with its place of business in another Contracting State (e.g., Mexico) will find that the Convention governs the sales contract unless the parties agree to make another law applicable. If either enterprise has more than one place of business, the Convention looks to the place most closely related to the transaction.<sup>3</sup>

#### B. THE CONVENTION'S LEGAL STATUS

The Convention entered into force on January 1, 1988, for the original eleven Contracting States, including the United States. For a country that becomes a party to the Convention after January 1, 1988, the Convention enters into force "on the first day of the month following the expiration of twelve months after the date [the country ratifies or accedes]."<sup>4</sup>

The Convention limits the reservations and declarations that a Contracting

State may make to those specifically authorized by the Convention itself.<sup>5</sup> As a consequence, most Contracting States have become parties to the Convention without making reservations. The United States has, however, made a reservation authorized by article 95. When ratifying the Convention, the United States declared that it will not be bound by article 1(1)(b), a provision that makes the Convention applicable if choice-of-law analysis points to the law of a Contracting State even if one or both parties to the sales contract do not have a place of business in a Contracting State.

Uniform implementation is encouraged by the Convention's directive that regard is to be had to "the need to promote uniformity in . . . application" when interpreting the Convention.<sup>6</sup> This directive is particularly important because the official text is equally authentic in each of the six U.N. languages: Arabic, Chinese, English, French, Russian, and Spanish.

Being a treaty ratified by the United States on the advice and consent of the Senate, the Convention is the supreme law of the United States.<sup>7</sup> However, the Convention does not necessarily displace state law. The Convention only applies to *international* sales contracts. State law, including article 2 of the Uniform Commercial Code, would not necessarily govern these international transactions because the Code is applicable only if choice-of-law analysis leads to U.S. state law.

Like the legal rules in most domestic sales laws, the Convention's rules are suppletory rather than mandatory. Thus, even if a sales contract falls within the Convention's scope, the parties to the contract may agree to exclude the application of all or part of it.<sup>8</sup> If, for example, the parties expressly agree on when the risk of loss shall pass, then the parties' agreement will displace ("derogate from") the Convention's provisions on this issue.

#### C. PARTIES TO THE CONVENTION

As of May 1, 1995, the following forty-four countries are parties to the Convention: Argentina, Australia, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Cuba, the Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Mexico, Moldova, the Netherlands, New Zealand, Norway, Romania, Russia, Slovakia, Singapore, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, the United States of America, Yugoslavia, and Zambia.

The following observations can be made about this list of Contracting States:

- (1) Canada and Mexico are parties to the Convention. In Canada, both federal and provincial legislation implement the Convention.

been published in 52 *Federal Register* 6264 (1987), in an appendix to title 15 of the *United States Code Annotated*, in the uniform laws volume of *Martindale-Hubbell*, and in the electronic databases of WESTLAW and LEXIS.

2. CISG art. 100.

3. CISG arts. 1(1)(a), 10.

4. CISG art. 99(2).

5. CISG arts. 92-98.

6. CISG art. 7(1).

7. U.S. CONST. art. VI.

8. CISG art. 6.

- (2) Most of the United States' European important trading partners are parties.
- (3) The United Kingdom is not yet a party. A June 1989 Department of Trade and Industry Consultative Document notes possible advantages if the United Kingdom were to accede. The present government does not, however, place a high priority on accession.
- (4) Japan is not yet a party. An official study group completed a review of the Convention more than a year ago, but the government has not yet acted.
- (5) Virtually all the Eastern Bloc countries, including the Russian Republic, are parties to the Convention. The predecessors of many of the new states in this area—the newly declared republics of the former U.S.S.R. and Yugoslavia, as well as the two states created by the split up of Czechoslovakia—were parties to the Convention. Whether, under public international law, the new states are bound as successor states is open to question. The United Nations, which is the depositary for the Convention, does not treat these new states as Contracting States until they declare their intention to be a party to the Convention.
- (6) Only a handful of countries from East Asia, Latin America, and Africa are parties, and even those countries that are Contracting States do not fall into a clear-cut pattern.
  - Argentina, Chile, Cuba, and Ecuador are the only parties from the Caribbean and Latin America.
  - Australia, China, New Zealand, and Singapore are the only Contracting States from East Asia.
  - Guinea, Lesotho, Uganda, and Zambia are the only Contracting States from sub-Saharan Africa.

Regional bodies, such as the Organization of American States, have recommended that member states ratify or accede to the Convention.

#### D. CASE LAW

In the interest of uniform interpretation the Convention directs fora to take into account relevant decisions of courts and arbitral tribunals in other jurisdictions.<sup>9</sup> To assist uniform application, the United Nations Commission on International Trade Law (UNCITRAL) has established a clearinghouse at its office in Vienna, Austria, that will (1) receive reports and abstracts of relevant national court cases or arbitral awards from a network of "national correspondents," and (2) publish the abstracts and otherwise make the reports available in a series known by the acronym "CLOUT."<sup>10</sup>

9. CISG art. 7(1).

10. The national correspondents for the United States are Professor John O. Honnold (University of Pennsylvania Law School) and Professor Hui-Wen Wang (SMU School of Law). This material is protected by copyright. Copyright © 2001 various authors and the American Corporate Counsel Association (ACCA).

As of May 1995, UNCITRAL had published six collections of these abstracts, and the U.N. publishing office has consolidated these first collections into publications for sale to the public. The decisions address three principal issues (1) whether the Convention applies; (2) whether a buyer has effectively avoided the contract following breach by the seller; and (3) what law governs the rate of interest a nonbreaching party may recover.

As of January 1, 1995, the Convention has been an important factor in only two reported cases in the United States. In the *Filanto* case, the district court construed article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to determine whether parties had agreed in writing to arbitrate. (The United States is a party to the New York Convention and has implemented it by part 2 of title 9 of the United States Code.) The court concluded that whether there had been an agreement in writing to arbitrate was a federal law question. To determine the content of this federal law in this context, the court further concluded, required reference to the Convention rather than to the Uniform Commercial Code. On the merits, the court held that an Italian shoe manufacturer had accepted a New York buyer's offer that expressly incorporated a third-party master agreement with an arbitration clause. Although an offeree's silence will not usually constitute acceptance of an offer,<sup>11</sup> the court found that the course of dealing between the parties created a duty on the part of the manufacturer to object promptly. Having failed to do so in this case, the manufacturer had accepted the offer with the arbitration clause.

The court in the *Delchi Carrier* case applied the Convention's damage provisions, but did so without considering whether the plaintiff was entitled to damages under the Convention. Several other U.S. cases have noted that the Convention might be applicable.<sup>12</sup>

#### E. RESOURCE MATERIALS

The official proceedings of the 1980 diplomatic conference at which the Convention was adopted are published in *United Nations Conference on Contracts for the International Sale of Goods—Official Records* (1981) (Sales No. E.82.V.5). For an annotated collection of the documents that make up the drafting history, see John Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer/Boston: Kluwer, 1989).

11. CISG art. 18(1).

12. See, e.g., *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992); *Delchi Carrier, SpA v. Rotorex Corp.*, 1994 U.S. Dist. LEXIS 12820, 1994 WL 495787 (N.D.N.Y. 1994); *Graves Import Co. v. Chilewich Int'l Corp.*, 1994 U.S. Dist. LEXIS 13393, 1994 WL 519996 (S.D.N.Y. 1994); *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1993 U.S. App. LEXIS 14211 (5th Cir. 1993) (no need to resolve dispute about whether CISG governs because issues—parol evidence, fraud in the inducement, duress—not covered by Convention).

The best English-language introductions to the Convention are:

John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Deventer/Boston: Kluwer, 2d ed. 1991); C.M. Bianca & M.J. Bonell eds., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1988); Nina M. Galston & Hans Smit eds., *International Sales* (New York: Matthew Bender, 1984); Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Deventer/Boston: Kluwer, 1989) [2d ed. forthcoming].

A useful collection of basic documents may be found in Reed R. Kathrein & Daniel Barstow Magraw eds., *The Convention for the International Sale of Goods: A Handbook of Basic Materials* (Chicago: A.B.A., 2d ed. 1990).

For more detailed lists of English-language writings on the Convention, see periodic bibliographies published in *The International Lawyer*: Peter Winship, "The U.N. Sales Convention: A Bibliography of English-Language Publications," 28 *Int'l Law* 401 & n.1 (1994). For a bibliography of non-English materials, see Michael R. Will, *Internationale Bibliographie zum UN-Kaufrecht* (Cologne: Bundesstelle für Aussenhandelsinformation, 3d ed. 1990).

#### F. IMPORTANT ADDRESSES

1. *United Nations Treaty Section*: Treaty Section of the Office of Legal Affairs, United Nations, New York, N.Y. 10017 (tel. [212] 963-7958/5048/5484; fax [212] 963-3693).
2. *United Nations Publications*: United Nations Publications, Sales Section, 2 U.N. Plaza, Room GA-32, United Nations, New York, NY 10017 (tel. [800] 253-9646; fax [212] 963-3489).
3. *United Nations Commission on International Trade Law (UNCITRAL)*: UNCITRAL, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria (tel. 43-1-21131-4060; fax 43-1-237485). The Secretary is Gerold Herrmann.
4. *UNCITRAL National Correspondents—United States*: Professor John O. Honnold, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, PA 19104; Professor Peter Winship, S.M.U. School of Law, Dallas, TX 75275-0116 (tel. [214] 768-2575; fax [214] 768-4330).
5. *U.S. State Department*: Peter H. Pfund or Harold S. Burman, Office of the Legal Adviser (L/PIL), Suite 203, 2430 "E" Street, N.W., Washington, DC 20037-2880 (tel. [202] 776-8420; fax [202] 776-8482).

## II. Why Attorneys and Their Clients Should Know Something about the Convention

### A. PROFESSIONAL RESPONSIBILITY

Because parties may agree to exclude the Convention altogether, it has occasionally been suggested that attorneys should automatically advise clients to ex-

clude the Convention.<sup>13</sup> A moment's reflection upon attorneys' professional responsibility to their clients should suggest that this advice is simplistic. Even if a client has the market power to insist on having U.S. law govern the sales contract, the attorney should know enough about the Convention to determine whether state law (e.g., the Uniform Commercial Code) or the Convention better protects the client's interests. If a client is unable to dictate the choice-of-law term, the attorney should, *a fortiori*, have a command of the Convention's advantages and disadvantages.

To say that the Convention should not be excluded without study does not mean either that an attorney should always advise a client to select the Convention or that the attorney should ignore the uncertainties inherent in a new law. Even proponents of the Convention concede the inevitability of uncertainties and that these uncertainties will persist at least until the development of a large body of case law and the publication of doctrinal commentaries.

This fear of uncertainty, however, is often exaggerated. As more and more countries become parties to the Convention, for example, clients trading in numerous foreign countries may discover that using a single contract form governed by the Convention is more efficient than having to select from among different contract forms governed by different national sales laws. Moreover, at times neither trading partner will be willing to have the law of the other party govern the contract. Such situations may arise especially in regard to contracts with state enterprises in Third World countries or with enterprises in eastern Europe. The Convention may provide a suitable compromise because it is the domestic national law of neither party.

### B. THE CONVENTION AS A SOURCE OF FEDERAL COMMON LAW AND *LEX MERCATORIA*

In the first U.S. case to construe the Convention the court examined whether the parties to an international sales contract had entered into an enforceable agreement to arbitrate disputes. The court concluded that the Convention, rather than the Uniform Commercial Code, was the source of the federal common law of contract.<sup>14</sup>

A growing body of commentary suggests that arbitrators hearing transnational commercial disputes frequently refer to a *lex mercatoria* or rules of a *new law merchant*. If this trend is true, the Convention is an obvious source of principles and rules of general contract law. The International Institute for the Unification of Private Law (UNIDROIT or Rome Institute) has undertaken a restatement of

13. See CISG art. 6.

14. *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

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general principles of contract law. In the latest draft of the Institute's effort, many of these principles are taken from the Convention.<sup>15</sup>

### III. When Does the Convention Apply?

The U.N. Sales Convention governs (1) *contracts for the sale* (2) of *goods* when (3) the transaction is *international* as defined by the Convention. The Convention defines only the third of these elements. As to the first two elements, the Convention provides some guidance by its articles that exclude certain issues and types of transaction from the Convention's coverage.

#### A. CONTRACTS OF SALE

The drafters of the Convention apparently assumed a universal understanding of what constitutes a "sale." The seller must "deliver the goods, hand over any documents relating to them and transfer the property in the goods," while the buyer must "pay the price for the goods and take delivery of them."<sup>16</sup> The principal point that the Convention does make clear is that it covers the *contractual* aspects of a sale and not the *property* aspects:

##### Article 4

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

(b) the effect which the contract may have on the property in the goods sold.

A seller does, however, make certain implied warranties with respect to title and intellectual property rights.<sup>17</sup>

Questions about the borderline between a sale and other transactions will be similar to those that arise under domestic law. The lease of goods (e.g., computer hardware) is presumably not a sale because the lessor retains title to the goods.

Similarly, to license a person to use property (if that property is a "good") probably is not to sell the property to that person. A contract to sell goods on credit with the retention of a security interest (even if called "retention of title") to secure payment of the purchase price, on the other hand, is probably a contract of sale because title eventually will pass.

Attorneys whose clients engage in these transactions will usually recognize the potential problems and should include explicit statements about whether the Convention is or is not to govern the contracts they draw up for these clients. Even if the attorneys conclude that the Convention does not govern by its own terms, they may incorporate some or all of its provisions into their contracts.

15. M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM J. COMP. L. 617-33 (1992).

16. CISG arts. 30, 53; cf. U.C.C. § 2-106(1) ("A 'sale' consists in the passing of title from the seller to the buyer for a price.").

17. CISG arts. 41-42.

Contracts for the rendering of services are generally excluded, but article 3 does provide a gloss on several common transaction types:

##### Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

The terms "substantial" and "preponderant" are not defined.

*Illustration 1.* A Texas computer dealer agrees to purchase assembled computers from a Mexican enterprise. (Both the United States and Mexico are parties to the Convention.) The Texas dealer supplies one of the five necessary components of an assembled computer, but this one component is worth 50 percent in wholesale value of the assembled unit. The Mexican enterprise supplies the other four components and the unskilled labor. Whether the Convention governs is uncertain. The Mexican "seller" has obligations to supply both labor and components. How does one determine the "preponderant part" of these obligations?<sup>18</sup> Similarly, the Texas "buyer" supplies a valuable component. How does one determine whether the component is a "substantial part" of the necessary materials?<sup>19</sup> On these facts, the parties are likely to be aware of the problem and should resolve the question simply by expressly choosing whether the Convention is or is not to apply.

#### B. GOODS

The drafters did not define "goods," but the drafting history shows that the drafters conceived of the term as broad and flexible. This intent is most clearly illustrated by the French language text, in which the original legal language (*objets mobiliers corporels*) was changed to a colloquial business term (*marchandises*). Commentators have generally concluded that the term "goods" includes tangible movables.

Questions about the borderline between "goods" and other forms of property will be similar to those that arise under domestic law. Thus, whether the "sale" of software, either custom-made or bundled with hardware, is covered by the Convention is an issue, just as it is under the Uniform Commercial Code. If the "seller" of the software adapts the software to the particular needs of a customer, it could be argued that the Convention does not apply because the preponderant part of the "seller's" obligation will be the rendering of services.<sup>20</sup>

18. CISG art. 3(2).

19. CISG art. 3(1).

20. CISG art. 3(2). See generally Arthur Fakes, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to Computer, Software, and Database Transactions*, 3 SOFTWARE L.J. 559 (1990); G. Gervaise Davis III, *Contract Issues in Software Development, Acquisition, Marketing, and Use*, in PLI, 2 COMPUTER SOFTWARE 1989: PROTECTION AND MARKETING 359 (1989).

mance." Here, of course, the sales agent and Buyer could avoid this difficulty by explicitly agreeing to make the Convention applicable (or to exclude it).

#### D. EXCLUDED TRANSACTIONS AND ISSUES

Articles 2 and 3 exclude certain transactions and certain types of property from the Convention's coverage. The most important are the exclusion of consumer and service transactions. Articles 4 and 5 exclude from the Convention's coverage most products liability issues, issues of validity, and questions of what effect the contract for sale has on property claims to the goods sold.

##### 1. Consumer Transactions

Article 2(a) expressly excludes sales to persons who buy goods for personal, family, or household use unless the seller did not know that the sale is to such a person:

###### Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. . . .

This definition is similar to that found in the Uniform Commercial Code, although the latter does not provide for the exception where the seller is unaware that the sale is to a consumer.

*Illustration 5.* Italian Manufacturer makes a personal computer that runs Nintendo-like programs. (Italy is a party to the Convention.) In a first transaction, Manufacturer sells a personal computer to a visiting tourist from New York, who purchases the computer for home use. The sale is not governed by the Convention. In a second transaction, Manufacturer sells 100 personal computers to a computer dealer whose place of business is in Brooklyn. The Convention governs this second sale because the dealer is not purchasing for his or her personal, family, or household use.

##### 2. Products Liability Claims

The Convention governs only the rights and obligations of the seller and buyer to a sales contract.<sup>23</sup> By necessary implication, the Convention therefore does not cover claims against other parties in the manufacturing or distribution chain. Moreover, the Convention expressly excludes claims for death or personal injury caused by the defects in the goods sold.<sup>24</sup>

*Illustration 6.* Seller has its place of business in Germany; Buyer has its place of business in Connecticut. (Germany is a party to the Convention.) Buyer purchases heavy equipment from Seller. A defect in a component of the equipment causes a fire

at Buyer's Connecticut plant. The fire injures an employee of Buyer, destroys the heavy equipment purchased, and damages other equipment owned by Buyer. The Convention does not govern liability for injury to the employee, but will govern damages to the equipment and to the other personal property of Buyer.

##### 3. Issues of "Validity"

Article 4(a) excludes issues of validity from coverage of the Convention:

###### Article 4

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

- (a) the validity of the contract or of any of its provisions or of any usage. . . .

These problems will be resolved by reference to domestic law. These issues include questions of fraud, duress, illegality, and unconscionability. What other issues may be called ones of validity is a matter of some concern. If this exclusion is read broadly, courts could undermine the uniformity that the Convention is designed to enhance.

*Illustration 7.* Seller has its place of business in France; Buyer has its place of business in New Jersey. (France is a party to the Convention.) The parties agree that if Seller fails to perform as agreed it will pay the sum of \$100,000. Assume that French law would uphold this term, but that New Jersey law would not enforce this term because the sum is unreasonably large "in the light of anticipated or actual harm."<sup>25</sup> Whether this term is enforceable is not resolved by the Convention, which leaves the issue to the domestic law chosen by application of traditional choice-of-law analysis.

#### IV. Revising Contract Forms and Practices

Sellers and buyers are not bound to accept the "default settings" found in the Convention. Article 6 of the Convention explicitly endorses the principle of freedom of contract:

###### Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate or vary the effect of any of its provisions.

Parties to a sales contract may allocate obligations and risks between themselves without having to worry about whether the contract terms are consistent with the Convention.

With few exceptions, contract forms drafted before the Convention came into force may continue to be used. Professor E. Allan Farnsworth has concluded, for example, that "[a]lthough a careful review is necessary, drafters likely will not need to engage in thorough rewriting or oust the Convention entirely by choosing another law."<sup>26</sup>

25. U.C.C. § 2-718(2).

26. E. Allan Farnsworth, *Review of Standard Forms or Terms under the Vienna Convention*, 21 CORNELL INT'L L.J. 439, 447 (1988); see also B. Blair Crawford, *Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187 (1988).

23. CISG art. 4 ("This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.")

24. CISG art. 5 ("This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.")

## A. EXCLUDING (OR INCLUDING) APPLICATION OF THE CONVENTION

1. *Excluding the Convention*

Having determined that the Convention is applicable to a particular contract, an enterprise may ask how to exclude application of the Convention. The enterprise should keep two general points in mind: (a) the exclusion should be explicit because some commentators question whether the Convention may be excluded by implication; and (b) the contract term should both exclude application of the Convention and state what law is to govern.

*Sample clauses*

The rights and obligations of the parties under this agreement shall not be governed by the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of the State of Connecticut, including the Uniform Commercial Code as enacted in Connecticut.

This Contract shall be governed by and construed under the laws of the Commonwealth of Pennsylvania, not including the 1980 United Nations Convention on Contracts for the International Sale of Goods.<sup>27</sup>

The validity and performance of this Agreement shall be governed by the internal law of the state of California without regard to its rules on conflicts of law. The parties exclude the application of the 1980 United Nations Convention on Contracts for the International Sale of Goods if otherwise applicable. . . .<sup>28</sup>

This Agreement shall be construed and governed in accordance with the Laws of the State of \_\_\_\_\_ applicable to agreements entered into in \_\_\_\_\_ between residents of \_\_\_\_\_, [insert if international] and without reference to the U.N. Convention on Contracts for the International Sale of Goods.<sup>29</sup>

**1051.18 Disclaimer of UN Convention on Sale of Goods. PURSUANT TO ARTICLE 6 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (UN CONVENTION), THE PARTIES AGREE THAT THE UN CONVENTION SHALL NOT APPLY TO THIS AGREEMENT.<sup>30</sup>**

*Illustration 8.* Importer has its place of business in Virginia; Exporter has its place of business in Argentina. (Argentina is a party to the Convention.) Exporter and Importer enter into an international sales contract. The written contract provides: "This contract shall be governed by the law of Virginia." Importer now asks whether the Convention has been effectively excluded? The federal Constitution clearly requires Virginia courts to enforce the Convention as the supreme law of the land.<sup>31</sup> Reference to the "law of Virginia" is, therefore, ambiguous. When the parties used the phrase, however, they may have intended to have domestic sales law govern rather than the Convention.

27. Crawford, *supra* note 26, at 193.

28. Davis, *supra* note 20, at 386.

29. Charles I. Weissman, *Counselling the Small Business*, in PLI, REPRESENTING THE SMALL BUSINESS para. 8.8 (1993).

30. Ronald E. Myrick & Penelope Smith Wilson, *Licensing Rights to Software*, in PLI, TECHNOLOGY LICENSING AND LITIGATION 1993, at 585 (1993).

31. U.S. CONST. art. VI.

Importer may be able to persuade a court of this intent, but why force a law suit when it could be avoided by express exclusion of the Convention?

2. *Making the Convention Applicable When It Would Not Otherwise Apply*

The Convention is silent about whether parties may choose to have the Convention apply to transactions that do not fall within its sphere of application. The Convention might not apply because the transaction is not "international" within the scope of article 1(1) or because the transaction or the property involved are expressly excluded from the Convention's coverage. Unless contrary to public policy, courts should enforce the parties' choice. It may be contrary to public policy, however, to apply the Convention to consumer sales or sales on execution of judicial process.

*Sample clauses*

The rights and obligations of the parties under this agreement shall be governed by the United Nations Convention on Contracts for the International Sale of Goods.

The rights and obligations of the parties under this agreement shall be governed by the United Nations Convention on Contracts for the International Sale of Goods notwithstanding that the rules of private international law (choice-of-law rules) might otherwise lead to the application of some other law.

*Illustration 9.* Importer in Illinois enters into a sales contract with Buyer in Nevada for the sale of computer equipment imported by Importer from Sweden pursuant to a contract governed by the Convention. The Importer-Buyer sales contract provides: "This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods." Will an Illinois (or Nevada) court enforce this choice of law? The Convention does not apply by its own terms because the sale is not between parties whose places of business are in two different Contracting States. A court should, however, enforce the agreement. The contract term may be read as incorporating the Convention's provisions by reference.<sup>32</sup> Query, however, whether an Illinois or Nevada court will enforce all the Convention's provisions, including its remedy provisions?

3. *Designating the Branch with the Closest Relationship*

Inclusion or exclusion of the Convention may be accomplished indirectly. When an enterprise has more than one branch it may wish to specify in its agreements the branch that has the closest relationship to the contract or its performance.<sup>33</sup> By doing so when the facts allow, the enterprise may designate indirectly whether it is deemed to act from a Contracting State for the purposes of determining whether the Convention applies to its sales contracts. Even if the parties agree on whether the Convention should apply, the addition of such a clause may be useful to reinforce the parties' agreement.

32. *Cf.* U.C.C. § 1-105, cmt. 1 ("an agreement as to a choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen").

*Sample clause*

The parties agree that Seller will perform this contract through its branch in [the United Kingdom] and that consequently this branch has the closest relationship to this contract.

4. *Derogating from the Convention*

When parties to a sales contract agree to specific contract terms, their agreement will be enforced even if the terms differ from Convention provisions (i.e., the contract derogates from the Convention). If parties agree, for example, to require a buyer to give notice of a defect no later than one year after delivery, this term will be enforced even though the Convention provides for a two-year period in the absence of agreement.<sup>34</sup>

## B. CHOICE OF LAW, FORUM, AND LANGUAGE CLAUSES

Even if the parties agree that the Convention should govern their sales contract they should consider the advisability of including choice-of-law, choice-of-forum, and choice-of-language clauses in their contract.

1. *Choice-of-Law Clauses*

Gaps in the Convention may be filled by reference to applicable domestic law.<sup>35</sup> To fill these potential gaps it may be advisable to select a back-up domestic law.

*Sample clauses*

Notwithstanding that the United Nations Convention on Contracts for the International Sale of Goods governs the rights and obligations of the parties to this contract, disputed issues not settled by the Convention or by the general principles on which it is based shall be resolved by application of the law of the State of Texas, including the Uniform Commercial Code as enacted in Texas.

This Contract shall be governed by and construed under the 1980 United Nations Convention on contracts for the International Sale of Goods, or, to the extent that the Convention does not settle the rights and obligations of the parties, the law of the State of Delaware.<sup>36</sup>

This Contract shall be governed by and construed under the law of the State of Delaware including, when it is, by its own terms, applicable, the 1980 United Nations Convention on Contracts for the International Sale of Goods.<sup>37</sup>

2. *Choice-of-Forum Clauses*

The Convention does not address what forum is to hear disputes that arise from an international sales contract governed by the Convention. Parties fre-

34. CISG art. 39(2).

35. CISG art. 7(2) ("Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.")

36. Crawford, *supra* note 26, at 193-94.

37. *Id.* at 194.

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quently choose to arbitrate these disputes, but they may also provide in their sales contract that a particular judicial forum will (perhaps exclusively) hear their disputes. The enforceability of these contract terms will be governed by non-Convention law.

3. *Choice-of-Language Clauses*

The official text of the Convention is equally authentic in each of the six U.N. languages: Arabic, Chinese, English, French, Russian, and Spanish. In addition, the Convention has been translated into other languages, including German and Italian. Attorneys in the United States are unlikely to be fluent in all of these languages. Under a generally accepted rule of public international law, differences of meaning in official texts should be reconciled by looking to the object and purpose of the Convention provision.<sup>38</sup> This rule may be difficult to apply in practice. One way to limit the risk of surprise is to provide that the English-language (or some other language) version shall govern in case of differences in the six authentic language versions.

*Sample clauses*

When a comparison of the authentic texts of a provision of the United Nations Convention on Contracts for the International Sale of Goods reveals a difference of meaning that cannot be reconciled by looking to the object and purpose of the Convention provision, the English-language version shall prevail.

The rights and obligations of the parties under this agreement shall be governed by the authentic English-language text of the United Nations Convention on Contracts for the International Sale of Goods to the exclusion of the other authentic language versions.

## C. CONTRACT FORMATION

1. *Contract Term Requiring a Writing*

The Convention has no statute of frauds. Parties may, however, require that the original agreement be evidenced by a writing or that a modification be so evidenced.<sup>39</sup>

38. Vienna Convention on the Law of Treaties art. 33(4) (A/CONF.39/27) (1969).

39. CISG arts. 11 & 29:

## Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

## Article 29

- (1) A contract may be modified or terminated by the mere agreement of the parties.
- (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such

A Contracting State may declare that it will not be bound by articles 11 and 29.<sup>40</sup> The United States has not made this declaration, but several other countries have done so. Even if a country makes this declaration, its formal requirements do not necessarily prevail. One must first go through a choice-of-law analysis to determine which country's law governs this issue.

A party concerned about the possibility that a contract may be enforced without the need for a writing may limit this risk by including in a written offer a clause requiring that the other party's acceptance be in writing or that a formal contract document be signed by both parties. Similarly, if a party is concerned that a contract may be modified without a writing, the party may include in its agreement a clause requiring a modification or termination to be in writing.

#### *Sample clauses*

**This offer may only be accepted by a writing indicating by its contents acceptance of the terms of this offer.**

**This contract may only be modified or terminated by agreement of the parties expressed in a writing signed by both parties.**

## 2. Merger Clause

The Convention does not incorporate a parol evidence rule.<sup>41</sup> Parties may wish to exclude reference to prior negotiations, especially when they fear representations made by agents without express authority. Parties may also wish to exclude reference to usages of trade because, for example, they may believe usages are uncertain. Contract merger clauses used in domestic contracts should be easily adaptable to an international sales contract.

#### *Sample clause*

**This agreement signed by both parties and so initialed by both parties in the margin opposite this paragraph constitutes a final written expression of all the terms of this agreement and is a complete and exclusive statement of those terms.<sup>42</sup>**

## 3. Firm Offer

Article 16 provides that an offer cannot be revoked if it indicates that it is irrevocable, "whether by stating a fixed time for acceptance or otherwise." This provision is a compromise between the common law rule (presumption of revocability) and the civil law rule (presumption of irrevocability). In the United States, the Uniform Commercial Code changes the common law rule to make

it more like the civil law, but with significant limitations.<sup>43</sup> Whether the language of an offer is revocable or irrevocable should turn on the intent of the parties, but this intent may be difficult to prove.<sup>44</sup> It is advisable to provide clearly in an offer whether it is revocable during any stated time period.

*Illustration 10.* On March 1 Buyer, a Delaware dealer, sends a letter to Seller, a French company, making an offer to purchase printing equipment and stating "this offer will lapse on March 15 unless I receive your notice of acceptance by that date." At the time of sending this letter Buyer believes that she is entitled to revoke her offer until Seller accepts it. May Buyer revoke this offer on March 10? Article 8(1) states that Buyer's letter should be "interpreted according to his intent where [Seller] knew or could not have been unaware what that intent was." In France a statement of a fixed time is assumed to be irrevocable, and Seller might not understand Buyer's subjective intent. Article 8(2) goes on to provide that if Seller did not know or could not know what Buyer intended by the wording of the letter, Buyer's statements are to be interpreted "according to the understanding that a reasonable person of the same kind as [Seller] would have had in the same circumstances." Would a reasonable French person understand Buyer's intent?

## 4. "Battle of the Forms"

The law has always had problems resolving issues when a seller acknowledges a buyer's order form with different or additional terms. The common law rule is that an acknowledgment of an offer that make any change in the offer is a counter-offer (the "mirror image" rule). This rule tends to favor sellers. The Uniform Commercial Code makes the same acknowledgment an acceptance of the offer in many cases, with the additional term deemed to be part of the contract if it is not material.<sup>45</sup> This rule tends to favor buyers. The Convention provides a strict "mirror-image" rule.<sup>46</sup> A reply that alters the offer is a counter-offer. Commentators disagree about whether performance by the counter-offeree is

43. U.C.C. § 2-205 (offer enforceable if signed assurance that it will be held open for not longer than three months; separate signature required if form supplied by offeree).

44. See CISG art. 8.

45. U.C.C. § 2-207.

46. CISG art. 19:

#### Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

40. CISG arts. 12, 96.

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

42. JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 111-12 (3d ed. 1988). This material is protected by copyright. Copyright © 2001 vari-

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acceptance of the counter-offer.<sup>47</sup> If the counter-performance does not indicate acceptance of the new terms (or if acceptance of the counter-performance does not indicate acceptance of the original terms), the Convention does not have a rule that resolves this dispute and domestic law may govern. Parties will no doubt develop boilerplate clauses purporting to deal with this problem—with the same likely success as under the Uniform Commercial Code or other domestic law.

*Illustration 11.* Buyer, a U.S. company, sends a purchase order to Seller, a French company, ordering a specified quantity of steel coils. The purchase order does not contain an arbitration clause. Seller promptly responds with an acknowledgment form that includes an arbitration clause. After the exchange of forms, Seller delivers and Buyer pays for the coils. In a subsequent dispute as to the quality of the coils, must the dispute be submitted to arbitration? Article 19(3) considers the arbitration clause a material alteration and therefore Seller's acknowledgment is a counter-offer. Buyer's taking over of the steel coils might be construed as acceptance of the counter-offer.<sup>48</sup> If Buyer's taking over of the steel coils does not indicate assent to the counter-offer, then there is a gap in the Convention to be filled pursuant to article 7(2). Of course, if the parties have developed a course of dealing or there is a relevant usage of trade as to arbitration, the course of dealing or usage will be applicable by virtue of article 9.

### 5. The "Fixed" Price

The Convention requires that an offer "expressly or implicitly [fix] or [make] provision for determining . . . the price."<sup>49</sup> This provision is somewhat less liberal than the Uniform Commercial Code.<sup>50</sup> Attorneys whose clients regularly enter into international sales contracts should review contract practices to ensure that offer forms or final contract documents fix the price or clearly indicate how the price is to be determined.

### D. PERFORMANCE OBLIGATIONS

Although the Convention sets out the seller's and the buyer's obligations, it does so in summary form. Consequently, the seller and buyer will almost always amplify the Convention's provisions by their agreement. To the extent the agreement is inconsistent with the Convention, the agreement will prevail.<sup>51</sup> To the extent that they do not agree to particular terms, the seller and buyer will also be bound by terms derived from their course of dealing and by the usages of their trade.<sup>52</sup> Disputes about whether a party has undertaken a particular obliga-

47. CISG art. 18(1) ("A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance." (emphasis added)).

48. CISG art. 18(1).

49. CISG art. 14(1); cf. art. 55.

50. See U.C.C. § 2-305 ("reasonable" price term supplied if parties intended to conclude a sales contract without settling the price).

51. CISG art. 6.

52. CISG art. 8.

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tion will usually require interpretation of the parties' agreement or of a usage rather than construction of the Convention.

Most existing contract forms already spell out the parties' obligations in detail, and these terms are unlikely to need revision. Attorneys should examine the Convention's statement of the obligations, however, to determine if the existing contract forms have gaps, because the Convention will fill these gaps.

The Convention literally does not require parties to perform their obligations in good faith. Commentators have, however, derived such an obligation from article 7(1).<sup>53</sup>

#### 1. Interpreting the Parties' Agreement

After the seller and buyer have reached an agreement, one of the parties may ask that its obligation be interpreted. As any student of contract law knows, judges and arbitrators have used various different approaches. Rather than leave interpretative techniques to the vagaries of local judges and arbitrators, the Convention tries to provide uniform rules of interpretation.<sup>54</sup> Illustration 10 (firm offer) *supra* suggested that article 8 is relevant to language used by a Delaware dealer ("this offer will lapse on March 15 unless I receive your notice of acceptance by that date") when communicating an offer to a French enterprise.

#### 2. Defining Obligations by Use of Trade Terms

The parties may use trade terms to specify the obligations of each party. These trade terms may be well known or, when they are codified by a trade association, the terms may be spelled out in a trade association publication. The "Incoterms" prepared by the International Chamber of Commerce (ICC) are the most widely used of these published trade terms. By use of an Incoterm, the seller and buyer incorporate the obligations spelled out in the ICC's *Incoterm* publication.

53. CISG art. 7(1) ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." (emphasis added)); cf. U.C.C. §§ 1-203 ("[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement"), 1-201(19) ("'good faith' means honesty in fact in the conduct or transaction concerned").

54. CISG art. 8.

#### Article 8

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

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

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

*Illustration 12.* Chilean Exporter sells goods "CIF Philadelphia (INCOTERMS, 1990)" to Pennsylvania Importer. (Chile is a party to the Convention.) Who must contract for the carriage of the goods? Article 31(a) requires that Exporter "[hand] the goods over to the first carrier for transmission to [Importer]." The relevant 1990 Incoterm states that Exporter must "contract on usual terms at his own expense for the carriage of the goods to the agreed port of destination." By incorporating the Incoterm (CIF) into their contract, Exporter and Importer have agreed that the more detailed statement of obligations in the Incoterm will amplify the Convention's provision.

3. *Course of Dealing and Usages of Trade*

Unless otherwise agreed, the seller and buyer to an international sales contract are bound by their course of dealing and by widely known usages of trade.<sup>55</sup> The Convention does not expressly make course of dealing or trade usage part of the parties' agreement.<sup>56</sup> Although some commentators have therefore questioned whether a usage may vary the effect of a Convention provision, a better reading of the Convention would give effect to the usage.

*Illustration 13.* In *Illustration 12 supra*, the Chilean Exporter and the Pennsylvania Importer agreed to a delivery term "CIF Philadelphia (INCOTERMS, 1990)." Assume that the same parties had omitted the express reference to Incoterms. What meaning should be given to the term "CIF"? The Incoterm definition of CIF obligations may nevertheless be applicable because the forum may conclude that use of Incoterms is "usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

4. *Obligation to Make a Conforming Delivery; Disclaimer of Warranties*

Under the Convention the seller's obligations to deliver goods of a certain quality resemble a seller's express and implied warranty obligations under the Uniform Commercial Code.<sup>57</sup>

55. CISG art. 9:

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

56. Cf. U.C.C. § 1-201(3) ("agreement" defined to include course of dealing and usage of trade).

57 CISG art. 35:

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

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Most domestic sales agreements include a warranty term expressly warranting specified qualities of the goods sold and disclaiming the implied warranties of merchantability and fitness for a particular purpose. Responding to judicial construction of these contract disclaimers over the last thirty years, domestic contracts have developed terms that will be enforceable in the absence of circumstances leading a court to question whether the term was bargained for. These domestic contract disclaimer terms may serve as models for an international sales contract governed by the Convention although the terminology should be modified to conform to the language of the Convention. Professor Farnsworth notes, however, that the Convention does not refer to "warranty" and he suggests substituting "there is no obligation of the seller as to the conformity of the goods."<sup>58</sup>

*Sample clauses*

**DISCLAIMER OF OBLIGATION AS TO CONFORMITY OF THE GOODS.** The parties agree that the seller undertakes no obligation with respect to the conformity of the goods to the contract except as otherwise provided in this contract document. In particular, THE PARTIES AGREE TO EXCLUDE ALL IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

**EXCLUSIONS OF WARRANTIES:** The parties agree that the implied warranties of MERCHANTABILITY and fitness for a particular purpose and all other warranties, express or implied, are EXCLUDED from this transaction and shall not apply to the goods sold.<sup>59</sup>

**SELLER EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR PURSUANT TO ARTICLE 35(2) OF THE CISG.<sup>60</sup>**

*Illustration 14.* Massachusetts Manufacturer sells equipment to French Buyer. The written contract expressly disclaims any warranty as to quality beyond the specific warranties set out in the contract, but the disclaimer does not use the word "merchantability." Will a Massachusetts court enforce the disclaimer? The Convention does not require use of any particular language (e.g., "merchantability") in a warranty disclaimer varying the effect of article 35. The Uniform Commercial Code does require the use

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Cf. U.C.C. §§ 2-313 through 2-316.

58. Farnsworth, *supra* note 26, at 443.

59. WHITE & SUMMERS, *supra* note 42, 498.

60. Crawford, *supra* note 26, at 202-03.

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of the word "merchantability" when disclaiming the implied warranty of merchantability.<sup>61</sup> It is conceivable that a Massachusetts court would interpret use of the word "merchantability" as an issue of validity and therefore not governed by the Convention.<sup>62</sup> A better interpretation would be to conclude that use of the word is not an issue of validity. The Uniform Commercial Code requires use of the word to ensure the parties have agreed to reallocate the risk that the goods supplied meet minimum standards of quality.

### 5. Implied Warranties with Respect to Title and Intellectual Property Rights

Although the Convention leaves many "property" issues to national law, it does provide for "implied warranties" with respect to title and intellectual property rights.<sup>63</sup>

*Illustration 15.* Computer Whiz of California sells used computer equipment, together with bundled Macrosafe software, to Dealer in Australia. (Australia is a party to the Convention.) The contract says nothing about title to the equipment or the software. Three months after delivery of the equipment in Australia, California Bank notifies the buyer that it claims a perfected security interest in the equipment. At approximately the same time, Macrosafe also notifies the buyer that the sale of the bundled software violates a licensing agreement between Macrosafe and Computer Whiz. Assuming that California Bank's claim is not without basis, Computer Whiz appears to have breached its obligation under article 41. As for Macrosafe's claim, however, one would have to inquire whether the buyer "knew or could not have been unaware of [Macrosafe's] claim" given that it should know that such claims are usual in the trade.<sup>64</sup>

61. U.C.C. §§ 2-314, 2-316.

62. CISG art. 4(a).

63. CISG arts. 41-42:

#### Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

- (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
- (b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

- (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
- (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

See also arts. 43-44 (notice requirement).

64. CISG art. 42(2)(a); see also *id.* art. 7(2)

### 6. Notice of Nonconformity

Unless otherwise agreed, a buyer must notify the seller of any nonconformity promptly and, in any event, not later than two years from the date the goods are handed over to the buyer.<sup>65</sup> A buyer that fails to act within these time periods may be barred from recovering compensatory damages.<sup>66</sup> The parties are free, of course, to vary the effect of this provision or to exclude it altogether.

#### Sample clauses

Notwithstanding article 39(1) of the United Nations Convention on Contracts for the International Sale of Goods, the parties agree that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within *FOURTEEN (14) DAYS* after he has discovered it or ought to have discovered it.

Notwithstanding article 39(2) of the United Nations Convention on Contracts for the International Sale of Goods, the parties agree that the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of *SIX MONTHS* from the date on which the goods were actually handed over to the buyer.

### 7. Force Majeure Clause

The Convention excuses a party who cannot perform its obligation because of an unforeseen impediment beyond that party's control.<sup>67</sup> The other party retains

65. CISG art. 39:

#### Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

66. See CISG arts. 43 & 44:

#### Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

67. CISG art. 79:

#### Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the

in the United States, however, will not be required to issue orders of specific performance in cases where, in an analogous domestic sales case, the court would not be required to do so.<sup>74</sup>

#### Sample clause

Notwithstanding articles 46 and 62 of the United Nations Convention on Contracts for the International Sale of Goods, the parties agree that neither party shall have the right to require, by order of a court or an arbitral tribunal, the other party specifically to perform its obligations under the Convention or this sales contract.

### 3. Interest

The Convention provides that a party may recover interest on sums in arrears, but does not indicate the rate of interest or how to determine this rate. Article 78 provides: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."<sup>75</sup>

What interest rate is applicable has been the issue in several German cases construing the Convention. These courts treat the issue as a gap in the Convention. They therefore turn to choice-of-law rules. There is no consensus, however, on the content of these choice-of-law rules. The most prominent court to address the issue, the *Oberlandesgericht* of Frankfurt, noted that commentators were divided on whether the applicable law was the law governing the sales contract, the law of the jurisdiction where the "creditor" had its place of business, or the law where the "debtor" had its place of business. The court declined, however, to resolve this conflict because the legal rates in the two possible jurisdictions in that case were the same.<sup>76</sup> Two German courts that did get to the merits of the issue chose the law of the "creditor" as the appropriate conflicts rule.<sup>77</sup> Yet another German court and an arbitral award, however, chose the law of the place where the buyer's payment was due under the sales contract. In these cases, the place of payment was where the goods were to be handed over.<sup>78</sup>

The only U.S. court to address article 78 concluded, without analysis, that

74. CISG art. 28 ("If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."); cf. U.C.C. § 2-716(1).

75. CISG art. 78.

76. *Oberlandesgericht Frankfurt a. M.* (5 U 261/90) (13 June 1991), 37 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 591 (1991).

77. *Landgericht Stuttgart* (3 KfH O 97/89) (31 August 1989), 35 RIW 984 (1989) (creditor's jurisdiction controls, especially because it is there that the consequences of the nonpayment are felt and because the price was to be paid in Italian lira); *Landgericht Frankfurt a. M.* (3/11 O 3/91) (16 Sept. 1991), 37 RIW 952 (1991) (law of creditor applicable).

78. *Landgericht Hamburg* (5 O 543/88) (26 Sept. 1990), 11 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 400 (1991); I.C.C. Case No. 7153 of 1992, 119 J. DR. INT'L 1005 (1992).

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the court had discretion to determine the rate of prejudgment interest. The court then chose, without explanation, the U.S. Treasury Bill rate<sup>79</sup> to compensate an Italian buyer who had rejected the U.S. seller's tender of nonconforming air conditioners.<sup>80</sup>

The parties may wish to state a rate of interest or provide a way to determine the rate. An unpublished court opinion from Argentina allowed the recovery of interest because the seller and buyer had expressly agreed to payment of interest on the unpaid price. The court also noted that the payment of interest was a widely known usage within the meaning of article 9(2).<sup>81</sup>

#### Sample clauses

If a party to this contract fails to pay any sum in arrears under this contract, the other party is entitled to recover interest on the sum at the judgment rate in the jurisdiction in which the aggrieved party has its place of business that is most closely related to the contract and its performance. Interest at this rate shall begin to accrue from the time of default. This right to recover interest is without prejudice to any claim for damages recoverable under the Convention.

The buyer shall pay interest at \_\_\_\_\_ % per annum on delay in paying for the goods. In no other situation will either party be liable for interest.<sup>82</sup>

### 4. Reduction of Price

Drawing on a traditional civil law remedy, the Convention authorizes a buyer to reduce the price to be paid when the goods tendered by the seller are nonconforming.<sup>83</sup> The price reduction formula in article 50 may yield a different result than do the regular damage formulas.<sup>84</sup> Louisiana attorneys will recognize the concept as similar to that found in articles 2541-2544 of the Civil Code, but attorneys trained in the common law may find the price reduction remedy strange. To avoid confusion, parties may wish to exclude application of article 50. Parties who consider excluding the article should recognize that article 50 is a self-help remedy that does not require the intervention of a court.

79. The court used the rate prescribed in 28 U.S.C. § 1961(a).

80. *Delchi Carrier, SpA v. Rotorex Corp.*, para. 14, 1994 U.S. Dist. LEXIS 12820, 1994 WL 495787 (N.D.N.Y. 1994).

81. *Elastar Sacifia (S/ Concurso preventivo S/ Incidente de Impugnación por Betcher Industries, Inc.)*, Juzgado Nacional de Primera Instancia en lo Comercial No. 7, Secretaría No. 14. (20 May 1991) [unpublished].

82. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 528 n.9 (2d ed. 1991).

83. CISG art. 50.

#### Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

84. See CISG arts. 74-76.

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*Sample clause*

The parties agree to exclude the application of article 50 of the United Nations Convention on Contracts for the International Sale of Goods, which would otherwise authorize the buyer to reduce the price in accordance with the formula set out in that article when the goods tendered do not conform.

**V. Conclusion**

All attorneys in the United States should have a basic working knowledge of the United Nations Convention on Contracts for the International Sale of Goods. They should know when the Convention will apply, and what it means if it does apply. Rather than automatically excluding application of the Convention, they should consider whether having the Convention govern the transaction is in the best interests of their client. When doing so, they should review existing contract forms and contracting practices. They will discover that contract terms and practices used before the Convention entered into force can, with few exceptions, continue to be used. Some changes may be necessary and this article suggests some alternative language. These suggestions are, however, no more than suggestions and this article is no more than an introduction to potential problems.

**OPIC'S Standby Foreign Exchange  
Liquidity Facility  
By  
Edward Kania**

**Presentation to American Corporate Counsel Association  
Annual Meeting  
October 17, 2001**

**Standby Forex Liquidity Facility**

- ◆ New OPIC product covering currency devaluation risk
- ◆ Currency Issues for all non-exporting cross-border transactions
- ◆ Disconnection b/w local currency revenues and dollar-denominated debt and sponsor returns

## Standby Forex Liquidity Facility

- ◆ Typical Mitigants or Strategies to address Currency mismatch
  - ◆ US Dollar off-take
  - ◆ Off-take denominated and payable in local currency but with indexation mechanism
  - ◆ Adjustment for local inflation
  - ◆ Financial hedges, swaps, forwards or options
- ◆ Law of one price or purchasing power parity

## Standby Forex Liquidity Facility

- ◆ Tiete Transaction
  - ◆ May 2001 AES \$300m refinancing of Brazilian hydro facilities
    - ◆ Refinancing comprised of a 144A/Reg S offering
    - ◆ Credit rated BBB- based on underlying credit and OPIC's Standby Forex Liquidity Facility
    - ◆ OPIC also provided currency conversion/transfer risk insurance

## Standby Forex Liquidity Facility

- ◆ Elements of the Tiete Credit
  - Hydro resources
  - Strong credit off-taker (Eletropaulo)
  - 15 year off-take contract
  - Secondary energy sold in a strong merchant market
  - Base case DSCR of 1.4x to 4.0x from stable, reliable cash flows
  - Strong, experienced management and operations personnel
  - Real depreciation risk

## Standby Forex Liquidity Facility

- ◆ Elements of the Forex Liquidity Facility
  - Subordinated to the 144A notes
  - \$30 million revolver to cover debt service shortfalls caused by devaluation
  - Funding when “necessary” and “sufficient”
  - Separation of currency and operating risks
- ◆ Benefits and Uses of the Facility
  - BBB- rating
  - Bridging short-term depreciation and use as adjunct to dollarized contracts



# Project Finance Participants

