THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 42-1992)

REPORT

ON

UNITED NATIONS (VIENNA) CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1980

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

The Law Reform Commission 1992
May 1992

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

John F. Buckley, Esq., B.A., LL.B., Solicitor;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, University of Dublin;
Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Psychologist, Eastern Health Board; Research Associate, University of Dublin;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty one Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp125-129.

William Binchy, Esq., B.A., B.C.L., LL.M., Barrister-at-Law, is Research Counsellor to the Commission.

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The Law Reform Commission

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15 April 1992

An Taoiseach Albert Reynolds, T.D.,
Office of the Taoiseach,
Government Buildings,
Dublin 2.

Dear Taoiseach,

Pursuant to the provisions of the *Law Reform Commission Act, 1975*, I have the honour to transmit to you herewith the Commission's **Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods.**

The Commission proposes to publish this Report in the near future.

Yours sincerely,

SIMON O'LEARY
Commissioner

CONTENTS *PAGES*

CONTENTS *PAGES*

documents in order to discern the precise nature and extent of the obligations assumed by the parties.

Contractual interpretation is greatly influenced by the operation of the parol evidence rule, which prevents extrinsic evidence being used to add to, subtract from, vary or contradict the terms of a written agreement or the terms in which the parties have agreed to record any part of their agreement.[1] There are, however, a number of exceptions to this rule.

In addition, a contract may be subject to conditions or external facts upon which the existence of contractual obligations depend.[2] This may have the result that there is no concluded contract at all.[3]

Implied Terms

In addition to the express terms upon which agreement was formed, there are circumstances in which the law implies a term into a contract.[4] The courts may draw certain inferences concerning the intention of the parties from the language of the contract, the conduct of the parties, or the facts and circumstances surrounding the agreement.[5] The bulk of the obligations which will be implied in a sale of goods transaction are now set out in the Sale of Goods Legislation.

S10 of the 1980 Act details certain terms which the statute implies in a sale of goods transaction. Section 10 reproduces ss11,12,13,14 and 15 of the 1893 Act which are inserted into a table set out in s10. These include instances where a condition is to be treated as a warranty (s11) and circumstances where terms concerning the title of the seller are imported into a contract for the sale of goods (s12).

Where the sale of goods is by description, it is an implied term of the contract that the goods will correspond with the description (s13(1)). Similarly, in cases of sale by sample, the quality of the bulk of the goods must correspond with that of the sample. Finally, s14 addresses the question of implied undertakings as to quality or fitness.

Regarding the above statutory provisions, s11 of the 1980 Act declares that it is an offence to restrict or exclude the rights protected therein.

Exemption Clauses

An exemption clause is a term of a contract which enables parties partly to limit their contractual and tortious liability. The exemption may be substantive so as

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1 *Per* Morris LJ in *Bank of Australasia v Palmer* [1897] AC 540.

2 Cheshire, Fifoot & Furmston's *Law of Contract*, 11th ed., 1986, p140.

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4 Guest in *Chitty on Contracts*, para 841; *Clarke*, pp69-79.

5 *Meskell v CIE* [1973] IR 121; *Glover v BLN* [1973] IR 388.

CHAPTER 1: INTRODUCTION

1. In its First Programme, laid by the then Taoiseach before both Houses of the Oireachtas on 4 January 1977, the Law Reform Commission stated that it intended to conduct research on, and formulate proposals for the reform of various aspects of private international law, including the rules of conflict regarding international sale of goods. In this area the Commission has already reported on the *Service of Documents Abroad in Civil Proceedings (1987)*, *The Recognition of Foreign Adoption Decrees* (1989) and *The Hague Convention on Succession to the Estates of Deceased Persons* (1991). The question of Ireland's accession to *The (Vienna) Convention on Contracts for the International Sale of Goods* was the next area to be considered.

2. To assist us in deciding whether Ireland should accede to the Convention, a detailed Research Paper was prepared and circulated to bodies and persons with a special interest and knowledge of this area. We are very grateful for the submissions which were received, and express our thanks to the following:

   Mr James C Bannon, Manager, Special Planning Unit, An Bord Trachtala.

   Dr Alina Kaczorowska, Lecturer in Law, University College Cork.

   This Report is based on the earlier Research Paper, and on the subsequent contributions which assisted in clarifying the issues involved. The Commission is, however, solely responsible for the contents of the Report.

3. The current Irish law on contracts for the international sale of goods

stems from a mixture of sources. In contrast to the position in some other jurisdictions, international contracts of this nature have not been the subject of distinct codification in Ireland. Determination of contractual disputes concerning the international sale of goods commonly requires consideration of the general law of contract and of personal property and of the legislative rules regarding domestic sale of goods. Above all, it necessitates reference to the complex Irish rules on the conflict of laws.

4. As an international business transaction, the contract for the sale of goods is fundamental. In light of the fact that disparities in the domestic laws of states can hamper international trade, several attempts have been made in recent decades, at the international level, to promote uniformity and consistency. Predictability can be achieved, first, by unifying the rules that govern the conflicts of law, and secondly, by providing a uniform substantive law. The Vienna Convention embodies the latter approach. By establishing a substantive uniform law to be applied to international contracts of sale between traders who have their places of business in different states, it aspires to remove many of the complexities associated with the application of foreign law, and to sidestep disparities between domestic legal systems, thereby creating a climate which is more favourable to international trade.

5. In this Report we examine the question of whether Ireland should accede to the *United Nations (Vienna) Convention on Contracts for the International Sale of Goods*. The Report sets out the present position as to the Irish law on international sales of goods and the relevant provisions of the Convention. It concludes with an assessment of the benefits to Ireland of accession to the Convention, and sets out proposals for the future.

CHAPTER 2: THE SALE OF GOODS

Introduction

In Ireland, the legal principles which govern the sale of goods come within the general law of contract. The sale of goods transaction, however, is a very individual and distinct form of contract. It follows that the legal rules which regulate it are made up of general contractual principles as well as rules which are exclusive to the sale of goods. The former are common law in nature, while the latter are primarily set down in legislation.

For the most part, Irish law draws little distinction between international and domestic contracts for the sale of goods. Both statute and common law acknowledge that special considerations apply to international sales, requiring some modification of the rules regarding domestic sales. Nevertheless, there is no distinct, comprehensive set of rules in Irish law catering solely for international sale of goods transactions. Accordingly, where a contract of sale of an international character is to be examined according to Irish law, the courts look primarily to the rules which govern domestic sales in Ireland.

Contracts for the sale of goods are primarily governed by the *Sale of Goods Act 1893*, and the *Sale of Goods and Supply of Services Act 1980*. These statutes are read, in part, as one Act and together they provide a basic code for transactions involving the buying and selling of goods. They insert a series of implied terms into the contract which to a large extent define the rights and duties of the parties. The legislation sets out substantive provisions dealing with such matters as transfer and delivery of the goods, the passing of risk of loss or deterioration of the goods and the remedies available to the parties in case of breach of contract. However, the legislation presupposes application of the basic rules of contract regarding, for example, the formation of the contract and the capacity of the parties to buy and sell.

Sale of Goods Legislation

General Law of Contract[1]

Three elements are vital to the creation of a legally binding contract. Firstly, there must be an agreement between the parties, characterised by the existence of offer and acceptance, that is an undertaking on the part of an offeror showing a willingness to enter into a binding contract, and an unconditional assent to the terms of the offer. On an objective examination of all the circumstances, a court will consider whether a firm offer has been made by one party, and whether that offer has been accepted by the other party. Secondly, it is essential that the parties actually intend to be contractually bound. An agreement will not give rise to contractual relations unless the parties forming the agreement actually intend to be legally bound by it. However, in the context of a commercial contract, there is a presumption in favour of the existence of such an intention. Thirdly, the law requires that there be consideration. Mere acceptance by the party is insufficient: something else must be given, or promised, in return for the contractual act or promise, except where the promise is under seal. These requirements are subject to the doctrine of privity of contract, that is a contract may generally not be relied upon by, or enforced against, a person who is not a party to it.

In addition the 1893 Act provides that in the case of contracts for the sale of goods as defined by s1 of the Act consideration must take the form of a transfer or promise to transfer property in the goods, on the part of the seller, and the handing over or promise to hand over a money consideration called the price, on the part of the buyer.[2] A contract for the sale of goods may be distinguished from a number of other contracts, such as contracts unsupported by consideration, or agreements to barter or exchange containing similar characteristics. These contracts are governed either by special legislation or by the general law of contract. The *Sale of Goods and Supply of Services Act 1980* itself differentiates between two other forms of contract besides a contract for the sale of goods, namely contracts for the supply of services, and for hire-purchase.[3]

Certain other transactions excluded from the ambit of the sale of goods legislation include contracts of bailment, contracts which are not bilateral, and those where the supplier or receiver of the goods is in fact an agent of the other party.[4]

A contract for the sale of goods and an agreement to sell goods must also be distinguished. A sale involves the elements of contract and transfer of ownership whereas an agreement to sell is merely a contract with ownership actually

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1 See generally R Clark, *Contract* (2nd ed 1987).

2 Section 1(1).

3 Sealy in *Benjamin's Sale of Goods*.

4 Section 61(4) of the 1893 Act affirms the exclusively bilateral character of the sale of goods transaction by excluding "any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

remaining in the seller.[5]

Capacity of the Parties

Section 2 of the 1893 Act provides that

> "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property"

Capacity to contract for international sales of goods is therefore also governed by the common law rules on capacity to contract and also the 1893 Act. Under existing laws the capacity of minors,[6] mentally disordered and intoxicated persons,[7] diplomatic and consular staff,[8] and prisoners[9] to contract is limited. The capacity of registered companies to contract is subject to the doctrine of *ultra vires* which prohibits a company entering into contracts outside the stated objects of the company as set out in its memorandum or articles of association. This rule and its consequences for third parties are now dealt with by s8(1) of the *Companies Act 1963* and Article 6 the *European Communities (Companies) Regulations 1973*

An agent may therefore enter into a contract with a third party on behalf of a principal and thereby create a legally binding contractual relationship between the principal and the third party. However, the powers of the agent to contract are limited. The agent must act within the actual or usual authority exercised by an agent of that kind.[10]

International Contracts for the Sale of Goods

There is no standard universal definition of what constitutes an international, as opposed to a domestic, contract for the sale of goods. It is evident that a transaction may be deemed "international" where merely one of its many facets has an international character.[11] The greater the number of international characteristics the more truly international the flavour of the transaction. Nevertheless, in legal terms, an international contract for the sale of goods possesses at least one of two basic features. First, the sale transaction may involve the movement of goods from one state to another, and second, the places of business of the parties to the contract may be located in different states.

The second factor has become the more generally accepted test of international

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5 The case of *Anderson v Ryan* [1967] IR 34 aptly illustrates the point.

6 Section 2 of the 1893 Act reiterates the statement in the *Infants Relief Act 1874* to the effect that contracts entered into by a minor for goods other than necessaries are absolutely void. See further Law Reform Commission Report No. 15 (1985) *Report on Minors Contracts.*

7 For the law relating to persons drunk or of unsound mind see Lunacy Act 1873, and also *Imperial Loan Co v Stone* [1892] 1 QB 601; *Hassard v Smith* (1872) IR 6 Eq 429.

8 *Diplomatic and Immunities Act 1967.*

9 Section 8 of the *Forfeiture Act 1870.*

10 See generally: GHL Fridman, *The Law of Agency*, 5th ed, 1903; R Lowe, *Commercial Law*, 6th ed, 1983, Chap 2; *Treitel*, Chap 15.

11 RM Goode, *Commercial Law*, 1982, pp531-32.

character,[12] primarily on account of the higher degree of legal complexity to which it gives rise. Where the parties to the contract emerge from different states the interplay of distinct legal systems and processes, of conflicts of laws and substantive rules, arises with greater frequency and to a higher degree. The transnational movement of goods, on the other hand, may be effected, perhaps through the role of a third party, by parties whose seats of business are located within the same state. In such an instance, the contract may be, for the most part, determined by reference to the domestic rules concerning sales of goods of that particular state.

On the other hand, a contract concluded by parties whose seats of business are in different states may not, in fact, necessitate the movement of goods beyond the border of a single state. In such a case, the practical complexity surrounding the transaction is minimised and the legal implications accordingly greatly reduced. The greatest degree of legal complexity arises in cases where both of these basic international characteristics are present, for example, in an export sale, where an Irish seller and a foreign buyer conclude an agreement involving the movement of goods from Ireland to a foreign country.

The 1980 Act

Irish law contains no provisions specifically for international sales. For the most part, however, substantive rules regarding domestic sales of goods are applicable to international sales under Irish law. Nevertheless, since the statutory regime which now represents the cornerstone of the regulation of sale transactions is primarily designed to protect consumers, exceptions are made regarding the application of some statutory provisions to international sales. The underlying premise is that the international sale is a truly commercial transaction carried out between business persons of equal bargaining strength, between whom the principle of freedom of contract may operate in its undiluted form. Specifically, the 1980 Act removes certain statutorily imposed restrictions on the operation of exemption clauses in the case of international sales of goods. The essential elements of a contract for the international sale of goods are defined in s61(6)(b) of the 1980 Act.

The first and basic prerequisite is that the place of business of each of the parties be in different states or, if the parties do not have places of business, that they be habitually resident in different states.

The second requirement for an international sale for the purposes of s61(6)(b) of the 1980 Act is the presence of one of three conditions surrounding the contract of sale. This test of an international sale relates not to the parties but to the transaction itself.

The first condition is that the contract involves the transnational

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12 *Id*, p531.

movement of goods.

The second condition is that, in addition to the parties having their places of business or habitual residences in different states, the fundamental aspects of the agreement, namely the components of offer and acceptance are effected in the territories of different states.

The third condition is the case where an offer and an acceptance are effected in the territory of a single state, but the delivery of the goods is to be made to a second state.

The Irish legislation is, therefore, more specific than the generally accepted test of international character based solely on the fact that the parties to the contract emerge from different states. The Irish approach incorporates this conflicts-of-law requirement, on the one hand, but in addition imposes a requirement that some substantive feature of the sale of goods transaction be independently international of the other. It follows that contracts which contain one or other of these two features, but not both, are in no way distinguished from domestic contracts for the sale of goods under Irish law. Moreover, as we shall see, the statutory distinction between international and domestic sales only operates in respect of specific limited provisions. In all other respects, the international contract draws on the same rules as its domestic counterpart.

International sales have particular physical, legal and financial risks which make contracts for this type of sale especially complex. This has necessitated the formulation of special rules above and beyond those which regulate the purely domestic contract. To a large extent these rules draw on common principles and practices at work in the international world of commerce. The principle of freedom of contract operates in this sphere to enable the parties to determine between themselves where the various risks associated with the transaction should fall. In interpreting a contract, therefore, the courts will primarily seek to unearth and give effect to the intention of the parties. The use of standard forms of international contracts of sale facilitates the creation, operation and determination of the transaction. These contracts give rise to standard legal implications in the absence of evidence of a clear intention to the contrary. The most common forms of international contracts for the sale of goods are the f.o.b. (free on board) contract and the c.i.f. (cost insurance freight)[13] contract.

13 See C Schmitthoff, *The Law and Practice of International Trade*, 7th ed, 1980.

CHAPTER 3: THE CONTRACT

Formalities of the Contract

Section 3 of the 1893 Act provides that contracts of sale can be in writing or oral, or partly in writing and partly oral. This provision is subject to s2 of the *Statute of Frauds (Ir) 1695* (7 Will 3.,c 12) which provides that certain contracts are to be unenforceable unless they are evidenced in writing. Of these the most important are contracts for the sale of land. In addition, contracts not to be performed within one year must also be evidenced in writing by virtue of s13 of the Statute of Frauds.

Express Terms

In determining the respective rights and obligations of the parties under a contract, the courts will look first and foremost to the contract itself. The contents of a contract are contained in terms, which may be express or implied. Regarding statements made by the parties, a distinction is drawn between warranties and representations. The former term is used in this context to indicate a term which has contractual effect and not in a technical sense which would signify a term the breach of which gives rise to an award of damages. In contrast, a mere representation will have no contractual effect. In establishing the distinction, regard must be had to such matters as the contractual intention of the parties, the importance of the statement, the stage in the transaction when the statement was made, and the question of whether the person making the statement has special knowledge or skill which the other party lacks.

In determining the legal impact of the express terms of a contract, the courts will employ an objective test based on a determination of the manner in which a reasonable person would understand those terms. The process of interpretation may be further complicated by express or implied cross-references in written contracts to other documents. It may be necessary to assess the terms of such

documents in order to discern the precise nature and extent of the obligations assumed by the parties.

Contractual interpretation is greatly influenced by the operation of the parol evidence rule, which prevents extrinsic evidence being used to add to, subtract from, vary or contradict the terms of a written agreement or the terms in which the parties have agreed to record any part of their agreement.[1] There are, however, a number of exceptions to this rule.

In addition, a contract may be subject to conditions or external facts upon which the existence of contractual obligations depend.[2] This may have the result that there is no concluded contract at all.[3]

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In addition to the express terms upon which agreement was formed, there are circumstances in which the law implies a term into a contract.[4] The courts may draw certain inferences concerning the intention of the parties from the language of the contract, the conduct of the parties, or the facts and circumstances surrounding the agreement.[5] The bulk of the obligations which will be implied in a sale of goods transaction are now set out in the Sale of Goods Legislation.

S10 of the 1980 Act details certain terms which the statute implies in a sale of goods transaction. Section 10 reproduces ss11,12,13,14 and 15 of the 1893 Act which are inserted into a table set out in s10. These include instances where a condition is to be treated as a warranty (s11) and circumstances where terms concerning the title of the seller are imported into a contract for the sale of goods (s12).

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Regarding the above statutory provisions, s11 of the 1980 Act declares that it is an offence to restrict or exclude the rights protected therein.

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An exemption clause is a term of a contract which enables parties partly to limit their contractual and tortious liability. The exemption may be substantive so as

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4 Guest in *Chitty on Contracts*, para 841; *Clarke*, pp69-79.

5 *Meskell v CIE* [1973] IR 121; *Glover v BLN* [1973] IR 388.

to limit the actual contractual obligations of that party, or it may be procedural thereby constraining the other party's entitlement to damages.

In order to be operative, an exemption clause must be incorporated into the contract thereby becoming an express contractual term. This process of incorporation may occur by way of signature, by the giving of notice or through a course of dealing between the parties.

The legislature has also stepped in to temper the harsh operation of exemption clauses against certain classes of persons. Nowhere is this more apparent than in the context of the sale of consumer goods where statutory restraint operates in favour of consumer protection. The 1980 Act prohibits any attempt to contract unilaterally out of the terms which are statutorily implied in a sale of goods. S55 of the 1893 Act (as amended by the 1893 Act) continues this protection.

However, and most importantly in the present context, s61(6) of the 1893 Act (as added by s24 of the 1980 Act) provides that parties to a contract for the international sale of goods have the ability to circumvent the statutorily implied terms contained in ss12 to 15. Nevertheless, precision and clarity of drafting is required and, in the absence of a clearly expressed intention to the contrary, these rights and duties will operate by implication.

Invalid Contracts

Even though the rules regarding creation and formation of contracts have been adhered to, other considerations may render a transaction invalid, in particular, the presence of any of the following factors: mistake, misrepresentation, and duress or undue influence.

Equity has also intervened in a number of areas of law to provide relief against harsh or unconscionable bargains. In Ireland courts have set aside or amended transactions in order to produce a fairer result,[6] especially, in situations involving inequality of bargaining power, senility, mental deficiency and business inexperience.[7]

Independent of the rules of contract and conveyance, contracts involving the commission of a legal wrong or which are contrary to public policy are invalid.[8]

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6 *Clark*, pp179-80.

7 *Buckley v Irwin* [1960] NI 98; *Greallish v Murphy* [1946] IR 35; *Rooney v Conway* [1982] 5 NIJB.

8 *Clark*, pp187-228.

I DUTIES OF THE SELLER

(i) Delivery

Section 27 of the 1893 Act declares that it is the duty of the seller to deliver the goods in accordance with the terms of the contract. For the purposes of the Act, delivery means the "voluntary transfer of possession" from the seller to the buyer.[1] The specific requirements regulating performance of the duty to deliver are set out in ss29 to 32. These provisions are primarily optional in nature and apply only in the absence of express or implied agreement between the parties as to delivery.

S29(1) provides that the seller's duty is to have the goods in a deliverable state at his or her place of business from where they may be collected by the buyer,[2] according to the terms of the contract or within a reasonable time.[3]

The seller is also obliged to deliver the quantity of goods which he or she has contracted to sell, neither more nor less [4] and in one load rather than in instalments, subject to the buyer's right to examine the goods to insure their conformity with the contract.[5]

(ii) Quality of the Goods

The duty resting on the seller regarding the quality of goods on delivery is determined, in the first instance, by reference to the express and implied terms

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1 S62(1).
2 M Forde, *Commercial Law in Ireland*, para 1.065.
3 *Hartley v Hymans* [1920] 3 KB 475.
4 S30.
5 S34(2).

of the contract. The matter is also the subject of statutory regulation contained in ss13 to 15 of the 1893 Act as amended by and inserted into s10 of the 1980 Act, which implies certain terms regarding the quality of the goods into the contract.

The basic requirement imposed by s14 of the 1893 Act as amended by the 1980 Act is that the goods be of merchantable quality and reasonably fit for the purpose for which they are intended, where the buyer has expressly or impliedly informed the seller of that purpose. The requirement will not apply in the case of a private sale where the seller is not selling goods in the course of a business or where the seller can show that the buyer does not rely, or that it is unreasonable for the buyer to rely, on the seller's skill or judgment.[6] Since the primary objective underlying the amendments introduced by the 1980 Act is greater protection for the consumer, the courts may be more inclined to a liberal interpretation in consumer rather than commercial sales.[7]

Where the sale is one by sample, s15 implies the conditions that the bulk shall correspond with the sample in quality, that the buyer shall have a reasonable opportunity of comparing the two, and that the goods shall be free from defects rendering them unmerchantable.

Where goods are sold by description, the term implied by s13 that the goods shall correspond with the description is rigorously applied and operates in the case of both commercial and private sales. The buyer must, however, have relied upon the description to avail himself or herself of s13. As regards motor vehicles s13 introduced additional implied terms that at the time of delivery of the vehicle under the contract it is free from any defect which would render it a danger to the public, including persons travelling in the vehicle.[8] The parties may not contract out of the provisions of s13.[9]

S12(1) of the 1980 Act also provides that there is an implied warranty that spare parts and an adequate aftersales service will be made available by the seller for a reasonable period.

II DUTIES OF THE BUYER

S27 of the 1893 Act states that it is the duty of the buyer to accept and pay for the goods, within a reasonable time, unless the parties have contracted otherwise or time is of the essence. In the absence of agreement to the contrary, the place of delivery is deemed to be the seller's place of business. Payment is to be in cash, due at the same time as delivery, although in practice cheques are generally acceptable.[10]

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6 *Draper v Rubenstein* 59 ILTR 119 (1925).
7 *Forde*, para 1.121.
8 *Glorney v O'Brien*, Lynch J, unreported, 14th November 1988.
9 S13(9).
10 S48(3).

III REMEDIES OF THE SELLER

(i) General Remedies

The seller has a range of potential remedies available should the contract fall through and the buyer fail to fulfil his or her side of the bargain. Generally speaking a seller will seek to recover the purchase price or to sue for damages for the buyer's breach of duty of acceptance. However, where the seller retains property in the goods or where they remain under the seller's control, he or she may avail himself or herself of certain remedies *in rem* [11] which provide a degree of security for payment of the purchase money by the buyer.

S39 lists the unpaid seller's statutory rights. They include, a lien on the goods or right to retain them for the price in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after possession of them has been given up. There is also a right of re-sale in certain conditions. The unpaid seller also has a right of withholding delivery.

(ii) Action for the Price

Section 49 also gives the seller the right to bring an action to recover the purchase price and damages for breach of contract.

Beyond section 49, the seller will be entitled to sue for the recovery of the price where the terms of the contract so permit. Regarding payment by instalment, actions for both the price and for damages may be maintained depending upon whether the claim relates to payments which are overdue or which will become due at some future time.[12]

(iii) Action for Damages

The seller's entitlement to damages is now covered by s50. The basic objective is to place the seller in the position he or she would have been had the contract been performed.[13] Recovery of damages is limited to loss which it is estimated might normally flow from the breach in the ordinary course of events and generally extends to loss of bargain and to expenses incurred as a result of the breach of the contract.[14] Some responsibility rests on the seller to mitigate the loss, so that the seller will be barred from recovering for loss which could have been avoided.[15]

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11 As opposed to remedies *in personam*, which can only be brought against the parties to the contract and which are not dependent upon the goods themselves.

12 The former may be recoverable in an action for the price, the latter in an action for damages.

13 *Re Vic Mill Ltd* [1913] 1 Ch 465.

14 S50(2). The subsection is based on principles set out by the court in *Hadley v Baxendale* (1854) 9 Exch 341.

15 *Payzu Ltd v Saunders* [1919] 2 KB 581.

IV REMEDIES OF THE BUYER

(i) Damages

The buyer's principal remedy is the right to bring a claim for damages arising out of the outright failure of the seller to deliver the goods, delay in delivery, or failure to deliver the goods in conformity with the contract. S51 allows an action for damages for non-delivery where the seller wrongfully neglects or refuses to deliver the goods to the buyer. This right is of course subject to the general law on damages and the doctrine of mitigation of loss.

Where time is of the essence as to delivery, the buyer may reject goods which are delivered after the stipulated time. In addition to, or indeed in place of rejection, the buyer may be entitled to damages for delay in delivery. If time is not of the essence, rejection is not possible and damages are the only option.

The buyer may recover damages for a breach of a contractual undertaking which does not include an entitlement to reject the goods. This is governed by s53 of the 1893 Act, as replaced by the table in s21 of the 1980 Act.

(ii) Further Remedies

Where the seller commits a fundamental breach or where the seller repudiates the contract, s36 provides that the buyer may terminate the agreement and reject the goods.

In addition s54 provides that nothing in the Act shall affect the right of the buyer "to recover money paid where the consideration for the payment of it has failed".

(iii) Specific Performance

Under Irish law specific performance is not generally available where damages would be an appropriate or adequate remedy. While specific performance is a remedy frequently sought under contracts for the sale of land, contracts for the sale of goods would not normally be specifically enforceable. S52, however, allows the granting of specific performance where the court thinks fit.

(iv) Proprietary Claims

Where the property in the goods has passed to the buyer together with the accompanying right to possession, the buyer may institute proceedings for delivery of the goods to him or her in reliance on the proprietary rights available.

CHAPTER 5: PROPERTY IN THE GOODS

Property

S1(1) of the 1893 Act defines a contract of sale of goods as "a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price." Property is a malleable concept which embraces the subject-matter of property rights, the most significant of which is ownership. The person who has property in goods may assert his or her rights as owner as against all others, although those rights must be exercised within the limits of the criminal and civil law. Section 62(1) makes it clear that, for the purposes of the 1893 Act, "property" refers to "the general property in goods", and not merely a "special property."

The question of property, and in particular, the question of when property in goods passes from one party to another, is of considerable importance in the context of the sale of goods transaction for a number of reasons. For example, the whereabouts of the property will determine the ability of the respective parties to exercise property rights and to assert proprietary claims and will have an impact on other claims, for example in contract or tort. Secondly, the issue of property is vital to an assessment of the claims of third parties. This is particularly apparent where one of the parties to the transaction becomes insolvent since the goods may be distributed together with other assets, leaving the other party without any preferential standing as a creditor.[1] Thirdly, the apportionment between the parties of risk for damage, destruction or loss of the goods is dependent upon the whereabouts of property, since as a general rule,

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1 Where the seller has been declared a bankrupt before the property in the goods has passed, the buyer may only seek damages alongside other creditors, even though he or she may have paid for the goods. Where the buyer has been declared bankrupt, the unpaid seller who has parted with property in the goods cannot recover them. If, in either case, the unfortunate party has property in the goods, then he or she may assert their right to ownership as against all third parties. In the first case the buyer may seek redelivery of the goods while in the second the seller may retain the goods pending payment in full.

property and risk go hand-in-hand.

Title of the Seller

Since the seller is obliged by statute to transfer property in the goods to the buyer, an important consideration will be whether property is in fact vested in the seller in the first instance. S12(1) of the 1980 Act inserted an implied undertaking as to the validity of the seller's title to the goods. The purchaser is, therefore, entitled to relief where the seller has no title to the goods at the time that they are to be transferred on or where the seller has a defective title.[2]

Transfer of Title by a Non-Owner

The importance of the requirement that the seller have a full and perfect title to the goods is reflected in the general principle *nemo dat quod non habet*: one cannot pass on a title which one does not in fact possess. This principle finds expression in s21(1) of the *Sale of Goods Act 1893*. There are a number of exceptions however, relating to estoppel,[3] market overt, revesting of property in stolen goods on conviction of offenders[4], mercantile agents,[5] voidable titles, [6] and the good faith of the buyer,[7] where the buyer can actually acquire good title despite defects in the seller's title.

Passing of Property in the Goods

As a general rule, property in the goods passes from seller to buyer under a contract of sale at the time when the parties intend it to pass. Property only passes, however, when the goods which form the subject matter of the contract have come into existence and are clearly identifiable.

S17(1) of the 1893 Act clearly establishes that, where there is a contract for the sale of specific or ascertained goods, the property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred. In the absence of a contrary intention, s18 sets out a series of rules which are to apply. The complexity of the law in this area led the drafters of the Vienna Convention to exclude it from the terms of the Convention.

Retention of Title

S19 of the Act allows the creation of a contractual term which will serve to delay the passing of property in the goods to the buyer until a certain condition is met. The condition would generally be that the purchase price be paid in full. The object is to protect the seller in the event of the buyer becoming insolvent. The

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2 See *United Dominions Trust (Ireland) Ltd v Shannon Caravans Ltd* [1976] IR 225, at p231.
3 *Forde*, para 1.259.
4 S24 of the 1893 Act.
5 S21(2) of the *Factors Act 1889*.
6 S22(1). Subs(2) provides that nothing in the section shall affect the law relating to the sale of horses.
7 S25 of the *Sale of Goods Act 1893*.

validity of retention of title clauses will depend on the construction of the condition itself. This area has been discussed in the *Report on Retention of Title* (LRC 28-1989), where the Commission made a series of recommendations for legislative changes in the law regulating these clauses. While recognising that retention of title clauses serve a useful function in trade and industry, the Commission concluded that their current use in practice leads to certain undesirable results[8] as well as complex and undesirable litigation due to the uncertainty of the present law.

Risk

Rules regarding risk settle the enforceability and discharge of obligations in light of the loss-making event.[9] At a practical level, risk is, therefore, central to a consideration of insurance. Where goods are lost, damaged or destroyed while at the seller's risk thereby preventing the fulfilment of the duty to deliver in accordance with the contract, the buyer will not be obliged to pay the purchase price and may in fact recover any sums paid on foot of the contract. Where goods which are at the buyer's risk are lost or destroyed, the buyer must bear the loss and tender the purchase price to the seller. Moreover, if the seller has not delivered the goods, he or she will be relieved from this and other duties arising under the contract. If the goods are merely damaged, the seller may deliver them and the buyer will be expected to accept delivery of the goods in their damaged state.

As a general rule, s20 of the 1893 Act provides that risk passes with the property in the goods. There are, however, a number of exceptions: where the parties themselves agree otherwise, where there is evidence of fault on the part of the buyer or seller, and where one of the parties is acting as a bailee or custodian of the goods.[10] S32(1) of the Act also sets out particular rules regarding risk where goods are in transit.

Frustration

The doctrine of frustration tackles the question of the impact which the loss-making event is to have on the contract. It deals with instances where performance of contractual obligations has become impossible and it applies at common law to all species of contract.[11]

In contrast to the concept of risk, frustration does not involve the apportionment of loss or responsibility on to one of the parties, but rather seeks to release both parties from their contractual obligations as the fairest means of avoiding disadvantage to either of them. The operation of the doctrine is limited to executory contracts so that as soon as property has passed, the contract is beyond

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8 LRC 28-1989, p19.
9 LS Sealy, 'Risk in the Law of Sale' (1972) 31 CLJ 225.
10 *Clarke v Michael Reilly & Sons* (1962) 96 ILTR 96.
11 Guest, in *Benjamin's Sale of Goods*, para 417.

its reach. It follows that the doctrine rarely applies to sales of unascertained goods.[12] Perishable goods are the subject of statutory regulation in the 1893 Act.[13]

12 *Forde*, para 1.186.
13 Ss6 and 7.

CHAPTER 6: CONFLICTS OF LAWS

Introduction

Conflicts of laws issues stem from cases involving geographically complex facts which have the potential to fall within the competence of two or more legal systems. The rules regulating the conflicts of laws, therefore, address such delicate concerns as the ability of a state to enforce its sphere of influence and the extent to which the courts of one state are willing and competent to assess and give effect to the legal rules of another state. Three particular issues arise: first, jurisdiction; secondly, the choice of law; and thirdly, the recognition and enforcement of judgments.

The application of the *United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980* does not as such interfere with existing rules on recognition and enforcement, and has limited impact in the area of jurisdiction. As regards choice of law, however, Ireland's accession to the Vienna Convention may greatly complicate the law in this area. Because the Vienna Convention does not cover all aspects of a contract, Irish courts may find that there may be situations where both the Vienna Convention and traditional conflicts of laws rules have to be applied. For example, the Convention is not concerned with issues of validity of the contract but does apply to issues of formation. In a case involving issues of misrepresentation as well as the formation of the contract, the courts will have to apply the Convention to the issue of formation and then go on to use traditional conflicts of laws rules to decide which law should apply to the issue of misrepresentation. It is clear that this will increase the complexity and length of litigation.

Jurisdiction: The Traditional Rules

When a claim involving a foreign element is raised before an Irish court, the first question to be considered concerns the ability of the court to hear and determine

the matter. Whether or not it is appropriate for the court to exercise jurisdiction is an issue to be determined according to Irish law and the Irish rules of procedure. For the most part, these rules follow the common law tradition although they have been substantially modified in the context of the European Community as a result of our accession to the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil & Commercial Matters* (the Brussels Convention).[1] The traditional rules are for the most part, though by no means exclusively, procedural in nature.[2] Generally speaking, for example, a link is established between the court and the defendant on the basis of service of a summons within the territorial borders of the state or of submission by that person to the will of the court. The procedural approach is more apparent regarding actions *in personam* than actions *in rem*. The latter are actions against property, the commencement of which may ultimately lead to the seizure of the property with a view to satisfying a claim. In Ireland, jurisdiction over actions *in rem* is limited to admiralty actions before the High Court. The exercise of jurisdiction over matters concerning contracts for the sale of goods and involving a foreign element is, therefore, regulated by the traditional rules regarding actions *in personam*.

The Brussels Convention

A special regime governing the exercise of jurisdiction by domestic courts over cases involving a foreign element operates within the European Community by virtue of the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968* (the Brussels Convention).[3] The Convention applies only as between EC member states and has its origins in Article 220 of the Treaty of Rome.[4] That article declares that member states shall, in so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals, *inter alia*, "the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals and of arbitration awards". It was recognised from the outset that the efficiency of the internal economic market is dependent upon the introduction of simplified and uniform legal mechanisms which encourage rather than hamper economic activity and that disparities between national laws and a member state's legal structures which create obstacles to a freely flowing economic market should be removed.

The underlying objective of the Brussels Convention, therefore, is to facilitate the free movement of judgments within the European Community. In fact the

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1 27th September 1968. The Convention was accompanied by a Protocol of 3rd June 1971 on the interpretation of the Convention by the European Court of Justice. Extensions to the membership of the communities necessitated amendment, for example, in the form of the Convention of 9th October 1978 providing for the accession of Denmark, Ireland and the United Kingdom. The Brussels Convention became part of Irish law with the enactment of the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988.*

2 W Binchy, *Irish Conflicts of Law*, 1988, p124.

3 See generally P Byrne, *The EEC Convention on Jurisdiction and the Enforcement of Judgments*, 1990; Irish Centre for European Law, *The Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments* (Papers and Precedents from the Joint Conference with the Union des Avocats Europeens held in Cork, September 1989) ICEL No 8, 1989; D Lasok and PA Stone, *Conflict of Laws in the European Community*, 1987.

4 *Treaty Establishing the European Economic Community*, 25 March 1957.

Convention goes beyond the mandate of Article 220 of the Treaty of Rome in that it constitutes a double convention. While Article 220 speaks solely in terms of harmonising rules regarding the recognition and enforcement of judgments, the Brussels Convention also tackles, in detail, the question of the assumption of jurisdiction over causes of action by the national courts of the member states. The view was taken that in order to create a simple yet truly effective recognition and enforcement mechanism it was necessary, in the first place, to lay down common rules regarding the exercise of jurisdiction. There is a natural link between jurisdictional rules, on the one hand, and rules of recognition and enforcement, on the other, so that to abandon the former to regulation by national measures would inevitably deprive the latter of the benefit of Community regulation.[5]

The Brussels Convention entered into force for the original six members of the Community in 1973. A Protocol in 1971 on the interpretation of the Convention by the European Court of Justice, entered into force in 1975. Both the Convention and Protocol were amended in 1978 to facilitate the accession of Denmark, Ireland and the United Kingdom[6] and again in 1981 in the case of Greece.[7] *The Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988* gave the Convention the force of law in Ireland.

The primary change brought to bear on the traditional rules stems from the direct nature of the Brussels Convention. In cases involving intra-EC conflicts of law, an Irish court must exercise jurisdiction on the basis of the rules set out in the Convention itself. Provided that the conditions contained therein have been satisfied, the ensuing Irish judgment will receive virtually automatic enforcement throughout the member states of the European Community. In turn, Irish courts will accept the judgments of EC national courts which have been decided within the framework of the Convention, without being in a position to question the original exercise of jurisdiction. Uniformity and consistency in the application of the Convention is secured by the role of the European Court of Justice which is empowered to give preliminary rulings on questions of interpretation.[8] Any national court, other than a court of first instance, and any "competent authority" of a member state has a discretion to request a declaratory

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5 As the *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1988* by Mr P Jenard (The Jenard Report) indicates, much debate preceded the decision to create a Convention based on rules of direct jurisdiction. Ultimately it was felt that this type of Convention 'would allow increased harmonisation of laws, provide greater legal certainty, avoid discrimination and facilitate the 'free movement' of judgments, which is after all the ultimate objective'. 22 OJ Eur Comm (No C59) 1 (5 Mar, 1979) at p3.

6 *Convention on the Accession of Denmark, Ireland and the United Kingdom to the 1968 Convention and 1971 Protocol*, 9 October 1978.

7 25 October 1982. The accession of Spain and Portugal has been effected by the San Sebastian Convention 1989.

8 Article 2 of the Protocol.

ruling.[9] A final Court of Appeal is obliged to make a reference to the ECJ.

Article 1 of the Brussels Convention limits its application to "civil and commercial matters whatever the nature of the court or tribunal".

In addition, certain matters are expressly excluded from the ambit of the Convention:

(1) the status of legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(3) social security;

(4) arbitrations.[10]

Where the Brussels Convention does not apply, traditional common law rules as to jurisdiction must be used.

Choice of Law

Once an Irish court has established to its satisfaction that it is competent to exercise jurisdiction over a contractual claim, it may have to make a further decision where foreign law is pleaded as to whether it is appropriate to apply Irish law to the dispute in hand.[11] When making a choice as to the applicable law in contract, Irish courts traditionally searched for what is known as the "proper law" of the contract. Preference was generally given to the parties' choice with the result that the proper law might be the law expressly chosen by the parties in their contract.[12] In the absence of an express choice, the courts might infer from the conduct of the parties that a certain law had been selected as the applicable law.[13] In the alternative, the proper law would be that with which the contract had the closest and most real connection, in the view of the

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9 Articles 3 and 4. In contrast, Art 177 of the Treaty of Rome permits referrals from courts of first instance. The Jenard Report indicates, at p67, that "in view of the number and diversity of the disputes to which the Convention applies, an application for a preliminary ruling on the lines of *Article 177* might be made by one of the parties either as a delaying tactic or as a means of putting pressure on an opponent of modest financial means". In case 12/76 *Tessili v Dunlop AG* [1976] ECR 1473, the Court of Justice acknowledged that terms in the Convention are open to objective or independent interpretation on the one hand and to definition by reference to national legal systems on the other. In general, the former approach will be favoured although a determination as to the appropriate method of interpretation is distinct for each individual phrase or term and in all instances the objectives of Article 220 of the Treaty of Rome and the aims of the Convention itself must be taken into account.

10 Article 1(2).

11 See generally *Binchy*, p581; Cheshire and North, *Private International Law* (1988) 11th ed at p447; Morse in *Benjamin's Sale of Goods*, para 2414.

12 *Vita Food Products Inc v Unus Shipping Co.* [1939] AC 277; *Cripps Warburg Ltd v Cologne Investment Co Ltd* [1980] IR 321.

13 *Tzortis v Monark Line A\B* [1968] 1 WLR 406; *Hammond Lane Industries Ltd v Ongree Steel Trading Co Ltd*, (1956) 99 ILTR 5.

court.[14] A decision to this effect was reached after careful examination of all the circumstances surrounding the case.[15] The number and variety of relevant factors to be weighed up by the court would depend upon the peculiarities of the individual case[16] but, for example, might include the places of business of the parties, the place of performance and the currency of payment.

The Rome Convention

The Irish approach to choice of law in contract has undergone a significant change with the entry into force of the *Convention on the Law Applicable to Contractual Obligations 1989* (the Rome Convention), which is the subject of the *Contractual Obligations (Applicable Law) Act 1991.*[17] The Rome Convention is the product of EC co-operation although it does not have its origins in any provision of the Treaty of Rome. Its objective is to establish uniform choice of law rules with respect to contract for all member states of the Community. Signature by the original six member states of the Brussels Convention provided the impetus for further proposals for the unification and codification of the rules concerning the conflicts of laws within the EC. Somewhat far-reaching ambitions in this field were ultimately compromised[18] and a single convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980. Seven of the nine members signed immediately, including Ireland while Denmark and the United Kingdom subsequently followed suit. Greece agreed to accept the Convention by means of a Convention of Accession in 1984.[19]

Although a close relation of the Brussels Convention within the legal framework of the EC, the Rome Convention has a distinct character in a number of significant respects. On the one hand, it is not a truly EC Convention while on the other, it may have greater implications beyond the borders of the Community than its Brussels counterpart. Although the contracting states are the member states of the EC, ratification of the Convention is not a direct obligation of membership. The Convention was created by the EC with a view to furthering the objective of unification of law within the Community, but it does not come within the contemplation of Article 220 of the Treaty of Rome. This is reflected in the language of the Preamble to the Convention:

> "The High Contracting Parties to the Treaty establishing the European Economic Community,

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14 The courts formerly formulated tests on the basis of the presumed intention of the parties before settling on the closest and most real connection test: *Coast Lines Ltd v Hudig & Veder Chartering* [1972] 2 QB 34; *Cripps Warburg Ltd v Cologne Investment* [1980] IR 321.

15 *Id; The Assurzione* [1954] p150; *Amin Rasheed Corp v Kuwait Insurance Co* [1984] 1 AC 50.

16 In *Cripps Warburg*, D'Arcy J listed seventeen factors relevant to his determination of the proper law of the contract. [1980] IR 321 at pp335-36.

17 *The Contractual Obligations (Applicable Law) Act 1991* came into effect on 1 January 1992 with Statutory Instrument No. 303 of 1991. On the Rome Convention see generally *Binchy*, p552; *Cheshire and North*, p504; *Lasok and Stone*, p340; P Rogerson, 'The Rome Convention on Contractual Obligations' 141 New LJ 281 (March 1, 1991).

18 These included a proposal for a convention on non-contractual obligations.

19 Negotiations for the accession of Spain and Portugal are in progress.

Anxious to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

Wishing to establish uniform rules concerning the law applicable to contractual obligations,

Have agreed as follows.

..."

The non-obligatory nature of the Rome Convention has particular significance in the Irish context. The Convention is accompanied by two protocols and while the first is procedural in nature, the second is designed to empower the Court of Justice to hand down binding rulings on the interpretation of the Convention. Ireland, however, is not in a position to ratify this protocol, as to do so would be unconstitutional having regard to the terms of Article 34(1) of Bunreacht na hEireann. The European Court of Justice is only empowered to give judgments binding on our courts to the extent provided for in Article 29.4.3 of the Constitution. That provision protects "laws enacted, acts done or measures adopted by the State" only in so far as they are "necessitated by the obligations of membership of the European Communities". The Rome Convention, and the Protocols to it, clearly do not fall within the narrowly worded formula of Article 29.4.3. The jurisprudence of the Court of Justice on the Rome Convention will nevertheless remain of interest to the Irish Courts particularly in light of Article 18 of the Convention which provides that in the interpretation and application of its rules, regard shall be had "to their international character and to the desirability of achieving uniformity in their interpretation and application".

The second significant difference between the Brussels and Rome Conventions is the fact that the latter operates, in respect of the individual contracting state, in any case in which a choice of law in contract is to be made. In other words, the Convention does not merely apply intra the European Community. It will operate to replace the traditional rules concerning choice of law in contract in their entirety with the result that any future decision of an Irish Court concerning the applicable law in contract will be made on the basis of the provisions of the Convention. The fact that the foreign element is or is not of an EC character will be wholly irrelevant. The benefits for the European Community which stem from the Convention relate not to any notion of exclusivity in its application but rather to the prospect that national courts throughout the member states will act in concert in making choices of applicable law in contractual disputes. The Explanatory Memorandum to the 1990 *Contractual Obligations (Applicable Law) Bill* stated, in addition, that the Convention has a particular benefit for Ireland since it will provide "a coherent and comprehensive set of rules in an area of our law which is currently unclear and uncertain".

The scope of the Rome Convention is determined by Articles 1 and 2. It applies to contractual obligations in any situation involving a choice between the laws of

different countries and regardless of whether the country whose law is ultimately applied is an EC member state. Certain types of contractual obligation are, however, specifically excluded such as those relating to matrimonial property, wills, trusts, negotiable instruments, and insurance. Neither does the Convention cover questions involving the status or legal capacity of natural persons.[20] In these areas, therefore, traditional conflicts of laws rules will be used by the courts to determine which law should be applied.

The Choice of the Parties

The uniform rules concerning choice of law in contract are contained in Articles 3 to 22. The basic thrust of these rules closely resembles the traditional common law approach with the result that, in the Irish context, their application should not call for radical change. Article 3 gives expression to the well established principle of freedom of choice:

> "1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
>
> ..."

The proper law of the contract is, therefore, ascertained in the first instance by reference to the express or implied choice of the parties. An implied choice is revealed through evidence of a common intention which may be gleaned from a range of factors.[21] The freedom of choice enjoyed by the parties under Article 3(1) appears to be a very wide one. It is open to the parties, for example, to choose a governing law which has no apparent connection with the contract without having to offer any objective justification for their choice. The only significant qualification on the freedom of the parties is the provision of Article 3(3) which states that the choice of the parties of a foreign law, or of a foreign law and foreign tribunal, shall not prejudice the application of the mandatory rules of a country with whom all other relevant elements at the time of the choice are connected.

Although Article 3(1) permits the parties to select the law applicable to the whole or a part only of the contract, English courts have been reluctant to split

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20 Article 2, paragraph (a). This is said to be without prejudice to Article 11 which provides that, in the case of a contract concluded between persons who are in the same country, any natural person who would have capacity under the law of that country may invoke his or her incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

21 Such as the choice of a particular forum for arbitration. See *Tzortzis v Monark Lane A/B* [1968] 1 WLR406; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50. In contrast to their continental counterparts, Irish and English courts do not look to subsequent events as a means of revealing common intent: *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583. See Guiliano and Lagarde Report on the Convention OJ Comm, p17.

the proper law "readily and without good reason". Another change of emphasis will result from the operation of Article 3(2). That provision allows the parties to subject the contract to a law other than that which previously governed it. Any variation by the parties of the law to be applied, made after the conclusion of the contract, shall not prejudice its formal validity or adversely affect the rights of third parties. Binchy observes that:

> "[i]t seems clear that under Irish law at present, the Court would refuse to give effect to a purported change of the governing law where the purpose was to affect the rights of third parties adversely. Where this is the result, but was not the intention, the position is less certain, since the parties would have complied with the requirements of good faith in making their new selection".[22]

Applicable Law in the Absence of Choice

Article 4 lies at the heart of the Rome Convention and the attempt to unify choices of law in contract among the national courts of the member states. It provides that, in the absence of choice by the parties, the contract shall be governed by "the law of the country with which it is most closely connected". The Article continues:

> "(2) Subject to the provisions of paragraph (5) of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
>
> ...
>
> (5) Paragraph (2) shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs (2), (3) and (4) shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country".[23]

The generality of the "closest connection" formula is balanced by the use of

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22 *Op cit*, p557.

23 Paragraphs (3) and (4) deal with contracts involving immovable property and carriage of goods, respectively.

presumptions.[24] In this regard, the emphasis on the place of the party effecting characteristic performance represents a departure from the traditional approach in our courts. However, the question as to how characteristic performance is to be identified remains open:

> "Identifying the characteristic performance of a contract obviously presents no difficulty in the case of unilateral contracts. By contrast, in bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter-performance by one of the parties in a modern economy usually takes the form of money. This is not, of course, the characteristic performance of the contract. It is the performance for which the payment is due, ie. depending on the type of contract, the delivery of the goods, the granting of the right to make use of an item of property, the provision of a service, transport, security, etc., which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction".[25]

The presumption of the place of characteristic performance will be displaced where the evidence of the circumstances as a whole indicates otherwise. The court will then revert to the general test of "closest connection".

Article 7 of the Convention deals with the question of mandatory rules. Paragraph (1) permits the forum to give effect to the mandatory rules of the law of another county with which the situation has a close connection. Ireland reserved its right under Article 22 to exclude the application of this provision and Section 2(2) of the *Contractual Obligations (Applicable Law) Act 1991* states that it will not have the force of law in the State. Article 7(2) will, however, apply and it provides that nothing in the Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Once selected, the applicable law will govern, in particular, issues of interpretation and performance, prescription, termination of obligations, the consequences of nullity of the contract and, to the extent permitted by the procedural law of the forum, the consequences of breach, including damages.[26]

Where the Vienna Convention applies, however, it completely replaces the Irish conflicts of laws rules in this area. This is because the Convention itself, in Art 1(1)a, lays down the rules of its applicability, rather than the national rules of private international law or the rules of the Rome Convention. These rules are discussed in more detail in Chapter 7.

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24 *Lasok and Stone*, p361, point out: 'That 'closest connection' is the classic formula used by conflict lawyers who find themselves unable to agree on a meaningful solution was in fact recognised by the negotiators of the Convention, who proceeded to attempt to introduce some guidance for the courts by means of rebuttable presumptions'.

25 Guiliano and Lagarde Report, p20.

26 Article 10.

UNITED NATIONS (VIENNA) CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1980

CHAPTER 7: INTRODUCTION

History and Origins

The movement toward the creation of a uniform law which resulted in the conclusion of the *United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980,* is the culmination of over of a century of attempts to harmonise law in this area, including efforts made by the International Law Association in 1924, the League of Nations and the United Nations.[1] The immediate predecessors of the 1980 Convention were the Hague Conventions, a *Convention Relating to a Uniform Law on the International Sale of Goods* and a *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* adopted in 1964 (ULIS and ULF, respectively).

These Hague Conventions remain in force at the present time. In terms of acceptance by the international community, however, they have enjoyed only limited success. The number of contracting parties is small and the international representation limited. The handful of states for which the Conventions are in force are almost exclusively drawn from Western Europe.

The limitations of the Hague Conventions led the United Nations General Assembly to establish a Commission on International Trade Law (UNCITRAL), to enable the United Nations to play a more active role in reducing or removing legal obstacles to the flow of international trade. Its mandate included "the progressive harmonisation and unification of the law of international trade",[2] with a specific emphasis on worldwide participation.

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1 CM Bianca & M Bonnell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention, 1987,* p1; K Sono, "The Vienna Sales Convention: History and Perspective" in P Volken & P Sarcevic, eds, *International Sale of Goods: Dubrovnik Lectures,* 1986, 1-17, at p2.

2 UNCITRAL was set up by General Assembly Resolution 2205 (XXI) of 17th December 1966. See J Honnold, "The United Nations Commission on International Trade Law: Mission and Methods" 27 *Am J Comp L* 201 (1979).

This led to the adoption of the *United Nations (Vienna) Convention on Contracts for the International Sale of Goods* on llth April 1980. It was opened for signature until 30 September 1981, from which time it has been open for accession. In accordance with Article 99 of the Convention, it entered into force on 1st January 1988, twelve months after the deposit of the tenth instrument of ratification. Thirty two countries have already ratified, or acceded to, the Convention, including five of the member states of the EC.

Structure of the Vienna Convention

The Vienna Convention consists of a preamble and one hundred and one individual articles. It is divided into three parts which are in turn sub-divided into the following chapters:

Part I: Sphere of Application and General Provisions

Chapter I: Sphere of Application (Articles 1-6)

Chapter II: General Provisions (Articles 7-13)

Part II: Formation of the Contract

(Articles 14-24)

Part III: Sale of Goods

Chapter I: General Provisions (Articles 25-29)

Chapter II: Obligations of the Seller (Articles 30-52)

Chapter III: Obligations of the Buyer (Articles 53-65)

Chapter IV: Passing of Risk (Articles 66-70)

Chapter V: Provisions Common to the Obligations of the Seller and of the Buyer (Articles 71-88)

Part IV: Final Provisions

(Articles 89-101)

Features of the Convention

(i) Scope

The scope of the Convention is limited in three respects:

(a) The Convention is limited to *international* sales, i.e. contracts for the sale of goods between parties whose places of business are in different states. It can be applied to two categories of such international contracts:

- where the states are parties to the Convention, or
- where the rules of private international law lead to the application to the contract of the law of one of the parties to the Convention.

(b) The Convention only governs international contracts for the sale of *goods*. Moreover sales involving certain categories of goods are excluded. Most significantly, consumer sales, that is sales for personal, family of household use, fall outside the scope of the Convention.

(c) The provisions of the Convention tackle two specific subjects:

- The formation of the contract of sale; and
- The rights and obligations of the parties arising from the contract.

In particular, the Convention is not concerned with the issues of validity of the contract, the passing of property in the goods or liability of the seller for death or personal injury caused by the goods.

(ii) Non-Mandatory Character of the Convention

The primacy of the contract is the central theme of the Vienna Convention and it finds expression in a number of provisions which oblige the courts to respect the freedom of the parties and to give effect to their intentions, as manifested in the terms of the agreement which has been concluded. However, the concept of the freedom of the parties is even more fundamental in that it determines the very application of the Convention. The non-mandatory character of the Convention is explicitly stated in Article 6 which recognises that the parties may exclude the application of the Convention altogether.

(iii) Style

An essential objective of the Vienna Convention is simplicity and clarity of style. The signatories to the Convention had in mind that its provisions should be readily understood by the ordinary trader in all corners of the globe.

CHAPTER 8: GENERAL PROVISIONS

I APPLICATION

International Sales

The application of the Vienna Convention is limited by Article 1 to contracts of an international character. This is determined by reference to two criteria: first, the location of the places of business of the parties and, secondly, the relationship between the contract and one or more of the contracting parties to the Convention. Article 1(3) precludes consideration of the nationality of the parties or of the civil or commercial character of the contract in determining the applicability of the Convention.

Place of Business

A determination of the respective places of business of the parties to the contract of sale is a prerequisite to the application of the Vienna Convention in accordance with Article 1. The Convention itself, however, offers no specific definition of what constitutes a "place of business".[1] General principles of law must, therefore, be used to fill the gap.[2]

It was the subjective nature of the place of business criterion, with its emphasis

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1 Some delegates to UNCITRAL argued in favour of the inclusion of a specific definition: "Analysis of Comments and Proposals by Governments and International Organisations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses" (Doc A\CONF 97\9) in *Documents of the Conference*, p71. See *Richards*, p219, BJ Richards, "Contracts for the International Sale of Goods: *Applicability of the UN Convention*" 69 Iowa L Rev 209.

2 A Rosett, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" 45 Ohio State LJ 265 (1984) at p279. The International Chamber of Commerce (ICC) was of the opinion that it should be made clear that, for a place to be a place of business, a permanent business organisation including a physical location and employees for the sale of goods or services should be maintained. See *Documents of the Conference*, at p73.

It was the subjective nature of the place of business criterion, with its emphasis on the nature of the parties, that prompted the Hague Conference to include the objective criteria, based on the transaction itself, in Article 1 of ULIS.[3] Where there is more than one place of business, Article 10(a) provides that the place with the closest relationship to the contract is chosen.[4]

Emphasis is on the place of performance of the contract, rather than the place of negotiation.

Discussions at the Vienna Conference indicate that place of business will be construed to mean a permanent and regular place for the transacting of general business, rather than a temporary site of negotiations.[5] In cases where a party does not have a place of business, reference is to be made to the habitual residence of the party. The Convention will accordingly come into operation if that habitual residence is deemed to be in a different state to the relevant place of business of the other party.

Article 10(a) clearly indicates that a determination as to the most closely related place of business is based upon the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. Therefore contracts involving an undisclosed foreign principal will not be subject to the Convention as the fact that the parties have their place of business in different states must be apparent before the conclusion of the contract.

Relation of the Contract to a Contracting State

The provisions of Article 1(1)(a) replace the Irish conflicts of laws rules in this area in that the Convention itself lays down the rules of its applicability rather than national rules of private international law.

In addition to satisfying the criteria of internationality, a contract will come within the scope of the Convention only if it can be shown to bear a specific relation to one or more of the contracting states to the Convention. Article 1 sets out two options in this regard. Article 1(1)(a) provides that both of the states in which the parties have their relevant places of business must be contracting states. In addition, the court seised of the case must be situated in a contracting state. While the certainty of the provision is commendable, it is evident that its application may be limited in light of the conditions to be fulfilled.

Article 1(1)(b) presents a far broader ground for applicability. It is designed to bring within the scope of the Convention transactions where only one of the parties has his or her place of business in a contracting state. Provided that the

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3 *Richards*, p218.

4 Both the ICC and Finland had protested about the vagueness of the phrase 'closest relationship'. The latter proposed a text which relied on the place from which the first offer or reply was made that led to the conclusion of the contract. See *Documents of the Conference*, pp73-4.

5 *Honnold*, paras 43 and 124. The official French and Spanish texts would appear to reject the inclusion of a temporary place.

contract is international in character,[6] it will be sufficient that the conflicts of law rules of the jurisdiction where the case is being tried point to the application of the Convention. Under this Article, therefore, the forum does not have to be situated in a contracting state.

Subparagraph (b) of Article 1(1) was a controversial addition to the Vienna Convention given the complexity and uncertainity of the rules of private international law. Conflicts rules might, for example, indicate that one law might be applicable with regard to formation and another with regard to performance.[7] Article 95, therefore, allows a state to 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.

To date, the governments of China, Czechoslovakia and the United States have declared that they will not be bound by subparagraph 1(b) of Article 1. The Government of Canada has excluded its application in respect of the province of British Columbia while the Government of Germany has declared that it will not apply Article 1(1)(b) in respect of any states that had made a declaration excluding the application of Article 1(1)(b).[8]

The Application of the Vienna Convention can be further limited by federal states and states involved in regional arrangements.

Article 93(3) allows a federal state to declare that the Convention applies to only some of its territories, or will apply at a later time.

Article 94 allows states already involved in regional arrangments to declare that the Vienna Convention will not apply to contracts of sale between these countries. Upon ratifying the Convention [9] Denmark, Finland, Norway and Sweden entered a reservation pursuant to Articles 94(1) and 94(2) declaring that sales between parties who have their place of business in the Nordic countries will be governed by the domestic Nordic sales law instead of the Vienna Convention.[10] The intention was not to displace the Convention in favour of less progressive arrangements but rather to preserve more far reaching regional systems.

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6 That is, that the relevant places of business of the respective parties are in different states.

7 Honnold, *Uniform Law for International Sales*, para 47.

8 Information supplied by Eric E Bergsten, Secretary of UNCITRAL. Appendix B to Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods (1980) attached to the Letter of Submittal from the Secretary of State to the President recommending that the Convention be transmitted to the Senate for its advice and consent to ratification, 30 August 1983, reproduced in 22 *International Legal Materials* 1368 (1983) at p1380.

9 Finland and Sweden ratified the Convention on 15 December 1987, Norway on 20 July 1988 and Denmark on 14 February 1989. The Convention entered into force for these States on 1 January 1989, 1 August 1989 and 1 March 1990, respectively.

10 Ratification on the part of these four states was in each case made subject to a further reservation under Article 92(1) of the Convention which permits contracting states to exclude the applicability of Part II of the Convention concerning the formation of contracts.

II SCOPE

The scope of the Vienna Convention is limited in a number of respects. Even where the conditions of Article 1 are satisfied, further questions of applicability warrant consideration. These outstanding limitations relate to the subject manner and nature of the transaction, on the one hand, and to the range of legal issues tackled by the Convention, on the other.

Articles 2 to 5 set out a series of specific grounds upon which the application of the Convention is excluded. These provisions serve to refine the operation of the Convention, supplementing Article 6, which allows the parties to preclude its application and rely on the applicable national law.

Sales

The Convention applies, by virtue of Article 1(1), to "contracts of sale of goods". The concept of a sale is not defined, although a conventional definition is implied by the subsequent references to the obligations of seller and of buyer (Articles 30 and 53 respectively).[11]

Goods

In addition, six specific categories of transaction automatically fall outside the ambit of the Convention by virtue of Article 2. The first relates to the purpose for which the goods are purchased, the second and third to the method by which the transaction is executed, and the final three categories to the nature of the goods sold.[12] Excluded categories are: consumer sales; sales by auction; [13] sales on execution or otherwise by authority of law; sales of stocks, shares, investment securities, negotiable instruments or money (although documentary sales of goods remain within the scope of the Convention[14]); sales of ships, vessels, hovercraft[15] or aircraft; and the sale of electricity.

The rationale for excluding these particular transactions was the exceptional nature of the national legal requirements governing them. As regards consumer sales the framers of the Convention were conscious of disparity among the various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from the Convention.[16]

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11 B Nichols, "The Vienna Convention on International Sales Law" 105 L Q Rev, at p206 (1989).

12 *Secretariat Commentary*, p16.

13 *Id.* These special rules deal primarily with the question of formation of contract. For example, s58(2) of the *Sale of Goods Act 1893* provides that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner.

14 *Secretariat Commentary*, p16.

15 *Id*, para 54. note 6. Uncertainty as to whether "hovercraft" are either ships or aircraft necessitated the inclusion of a separate category.

16 *Id.* The International Chamber of Commerce (ICC) was of the view that the exclusion of consumer sales in paragraph (a) might make the Convention acceptable to a larger number of states: "Analysis of Comments and Proposals" prepared by the Secretary General, *Documents of the Conference*, p72.

Contracts for Services or for Goods to be Manufactured
Determining whether a particular transaction constitutes a sale of goods becomes more difficult where the supply of goods is supplemented by some additional act. Article 3 attempts to govern this situation.

While the Convention applies, as a general rule, not only to the sale of ready-made goods but also to the sale of goods to be manufactured or produced by the seller, those contracts under which the buyer undertakes to supply the seller (manufacturer) with a substantial part of the necessary materials from which the goods are to be manufactured or produced are excluded as they are more akin to contracts for the supply of services or labour than to contracts for the sale of goods.[17]

Ultimately, deciding whether a contract is for the sale of goods or the supply of services is a question of degree. This may prove unsatisfactory since much will be left to subjective interpretation, particularly in the case of large, complex transactions.[18]

Substantive Coverage of the Convention
The scope of the Vienna Convention is also limited by Article 4 to governing certain key aspects of the contract of sale. Matters excluded from the ambit of the Convention fall to be governed by domestic law. The Convention deals, first, with "the formation of the contract of sale" and, secondly, with "the rights and obligations of the seller and buyer arising from such a contract". This division of the concerns of the Convention can be traced back to the decision of the Hague Conference in 1964 to adopt two separate conventions, one relating to a uniform law on formation (ULF) and the other relating to a uniform law on international sales of goods (ULIS).

The wording of Article 4 rules out the possibility of litigation on foot of third party interests; the Convention is concerned solely with contractual rights and obligations *inter partes*. Of particular significance is the fact that Article 4 combines with Article 2(a)[19] and Article 5[20] to remove the issue of product liability from the ambit of the Convention. The consumer must rely on protections afforded by domestic law. So, also, must the commercial purchaser who has suffered economic loss as a result of purchasing defective products from a distributor.[21]

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17 *Secretariat Commentary*, at p17.
18 *Nichols*, p207.
19 Paragraph (a) of Article 2 states that the Convention does not apply to sales 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. Upon ratifying the Convention, the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organisations of the Members Countries of the Council for Mutual Economic Assistance (Comecon) to be subject to the provisions of Article 90 of the Convention.
20 Article 5 excludes from the ambit of the Convention the issue of the liability of the seller for death or personal injury caused by the goods to any person.
21 Honnold, *Uniform Law for International Sales*, para 63.

Article 4 goes on to stipulate that, except as otherwise expressly provided, the Convention is not concerned with:

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

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

Validity was excluded from the scope of the Convention because of an understandable desire to preserve domestic competence over matters such as incapacity and illegality, and because of the diverse treatment of matters such as mistake, fraud and unconscionability in the various legal systems.[22]

Domestic rules governing validity, therefore, continue to apply although in the case of a conflict between a domestic rule and a provision of the Convention, the latter takes precedence.[23] The possibility of such conflict arising in the context of domestic requirements as to form was recognised at the outset. By virtue of Article 11, the Convention makes no demands as to form; the parties are free to establish by any means, including the testimony of witnesses, that a contract has been concluded. In contrast, some legal systems insist upon the requirement of evidence in writing as a means of determining validity. Article 96 steps into the breach and avoids any potential conflict by empowering a contracting state whose legislation requires contracts of sale to be in or evidenced in writing[24] to make a declaration to the effect that any provision operating to negate or dilute the requirement does not apply vis-a-vis that state.

Liability for Death or Personal Injury

Article 5 declares that the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. The primary motivation behind this provision is akin to the underlying premise of Article 2(a), namely, a determined intention not to interfere with the special protections afforded to the consumer by domestic law.

The Autonomy of the Parties

In contrast to the Hague Conventions, where parties to a contract must expressly provide for the application of the Conventions to their contract, the Vienna Convention automatically applies to all contracts within its scope. However, it is open to parties to a contract for the international sale of goods to contract out fo the provisions of the Vienna Convention. Article 6 allows parties expressly to exclude the application of the Convention to their contract or to vary the effect of any of its provisions.

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22 *Nichols*, p207.

23 *Secretariat Commentary*, p17.

24 Article 13 determines that, for the purposes of the Convention, "writing" includes telegram and telex.

The only exception to Article 6 is the protection afforded to domestic law requirements that there be written evidence of the contract. Under Article 12 parties cannot exclude domestic requirements that a contract be in writing where a state has made a declaration under Article 96.

The Vienna Convention does not allow parties to apply the Convention to contracts which would otherwise fall outside its scope. The choice of the Convention as the applicable law is made solely within the terms of its provisions.

III INTERPRETATION

Interpreting the Convention

Article 7(1) stresses that the primary concern of the domestic court must be the interpretation and application of the Convention in a manner which gives due recognition to its international character and the need to promote uniformity. To achieve this end, the court must set aside national thinking and have regard to what domestic courts in other contracting states have done,[25] and also look at the *travaux preparatoires*, the caselaw under the Convention and the writing of jurists.

This may require a certain effort on the part of national courts as the Vienna Convention is not supported by any form of institutional judicial or arbitral structure. UNCITRAL plans to compile a database of court and arbitral decisions interpreting the Convention, which should help ensure a uniform interpretation in all contracting States.

Good Faith in International Trade

Article 7(1) also requires parties to exercise good faith in the interpretation of the Convention. The good faith provision is somewhat controversial.[26] What is meant here is not the doctrines of good faith in the various contracting states, in Ireland the equitable doctrine of good faith. Instead the Convention seeks to apply the general principle of good faith in International Law.[27] This international principle is somewhat controversial and less developed than equitable doctrines, but does certainly apply to provisions governing performance and enforcement of the contract as well as to the rules on formation.[28]

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25 Maskow in Albert H Kritzer, *Guide to Practical Application of the United Nations Convention on Contracts for the International Sale of Goods*, 1989, at p109.

26 Honnold, *Uniform Law for International Sales* para 94. Evidently there was some concern among delegates that the term 'good faith' and the similar concept of 'fair dealing' are ambiguous and that their inclusion could lead to uncertainty. The 'good faith' provision appears in earlier drafts in the limited context of formation. The decision was taken to give the concept broader but not unlimited import. Hence its ultimate inclusion as a principle of construction in Article 7(1).

27 For example, in common law states, the good faith provision appears to be limited to performance and enforcement and not to the negotiating process whereas, in the case of the Convention, the principle applies to all aspects of interpretation and application, including aspects of the period leading to formation.

28 G Reinhart, 'Development of a Law for International Sale of Goods' 14 Cumberland L Rev 89 at p100 (1983) notes that, in this respect, the principle of good faith serves a similar function to the unconscionability provision of section 2-302 of UCC.

The text of the Convention admits of a potential conflict on the question of interpretation between the principles of good faith (Article 7) and freedom of contract (Article 6). Despite the airing of opposing views on this point it seems that, in the case of a clash, the autonomy of the parties would not be limited by the principle of good faith.

Gap-Filling

Domestic courts faced with the prospect of applying the Vienna Convention are afforded some guidance by virtue of paragraph (2) of Article 7. Matters which are not expressly governed by the Convention are to be settled, in the first place, in conformity with the general principles on which it is based. It is for the court to ascertain what those general principles are. While the most significant general principle underlying the Convention is the primacy of the contract, the following are other examples of general principles on which the Convention is based:

- the need for co-operation through the various aspects of the transaction;
- the standard of the reasonable person;
- the duty to communicate information needed by the other party;[29]
- the concept of notice to the other party in specified circumstances;[30]
- diligence and care;
- mitigation; and
- equal treatment and respect for the different cultural, social and legal backgrounds of the individual traders.[31]

Interpretation of Statements or Other Conduct of a Party

The interpretation of statements or other conduct of a party is subject to a two-tier test by virtue of Article 8. Feltham succinctly summarises the aim of the article as being:

> "[t]o ensure that statements of a tractor salesman from a developed country to a Nusquamian peasant are to be interpreted as they would be understood by the reasonable Nusquamian peasant".[32]

Paragraph (1) of Article 8 therefore employs a subjective test. Interpretation is based on the intent of the party making the statement provided that "the other

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29 *Honnold*, para 100.
30 *Kritzer*, pp115-16.
31 Kastely in *Kritzer*, at p116.
32 "The United Nations Convention on Contracts for the International Sale of Goods" [1981] *J of Bus Law* 346, at p349.

party knew or could not have been unaware what that intent was". Paragraph (2) sets out an objective approach.[33] The understanding which a reasonable person would have had in the same circumstances becomes the applicable yardstick. Paragraph 3 establishes that the process of determining the intent of a party must take on board all relevant circumstances, including extrinsic and oral evidence.

In the Irish context, Article 8 would be unlikely to give rise to difficulty,[34] but two points are worthy of note. First, an Irish court would be able to cast aside the remnants of the parol evidence rule. Secondly, evidence of subsequent conduct would now become admissible.[35] This would signify a reversal of the position as stated by the House of Lords in *James Miller & Partners v Whitworth Estates (Manchester) Ltd.*[36]

Usages and Practices

The contentious issues of usages and practices are dealt with by Article 9 which essentially provides that parties are bound by the usages and practices to which they have agreed, and by standard usages and practices in the absence of any such agreement.[37] In order to bind, the usage must not only be one of which the parties knew or ought to have known but, moreover, it must be one which is widely known to and regularly observed in the international trade in question.

IV FORMALITIES

The combined effect of Articles 11, 12 and 96 is to allow states to preserve domestic requirements that contracts be in writing. While Article 11 provides that contracts need not be evidenced or concluded in writing, Article 96 allows states to make a declaration excluding the application of Article 11, and preserving domestic requirments as to form. Under Articles 12 and 96, the provision (under Article 11) that there is no requirement of form does not apply to a contract involving a party who has his or her place of business in a state that has made an Article 96 declaration i.e. the pre-Convention position will remain.

It must be remembered that the domestic requirements of the declaring state will not automatically apply. It is only when, in accordance with rules of private international law, the applicable law is determined to be that of the declaring state, that the declaration will come into play. Article 12 is, of course, the only provision in the Convention which the parties cannot exclude by virtue of Article 6.

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33 *Honnold*, para 106.

34 See *Nichols*, p210, on the English position.

35 The provision in the Convention mirrors the approach under UCC sections 2-207(3) and 208(1).

36 [1970] AC 583.

37 S Bainbridge, "Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions" 24 *Virginia J Int'l* 619, at pp623-24 (1984).

V FINAL PROVISIONS

Part IV of the Convention contains the final provisions, which are for the most part administrative in nature. The text of the individual articles is contained in the Appendix.

(i) Entry Into Force

Provisions commonly found in international treaties are found in Part IV starting at Article 89. First opened for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods, the Convention remained open for signature by all states until 30 September 1981.[38] Signatory states are further required to ratify, accept or approve the Convention.[39] The Convention has been opened for accession by all other states since 30 September, 1981.[40] Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary General of the United Nations,[41] the designated depositary for the Convention.[42] The Convention entered into force on the first day of the month following the expiration of the twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.[43] This occurred on 1 January, 1988.

The Convention enters into force for individual states which had not become a party to it before 1 January, 1988 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.[44]

Article 100 declares that the 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 particular contracting state or states connected with the contract in accordance with Article 1. Similarly, with respect to contactual rights and obligations, the Convention applies to contracts concluded on or after the date when it enters into force for those states.

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38 Article 91(1). The following states had signed the Convention by that date: Austria, Chile, China, Czechoslovakia, Denmark, Finland, France, Germany, Ghana, Hungary, Italy, Lesotho, Netherlands, Norway, Poland, Singapore, Sweden, USA, Venezuela, and Yugoslavia.

39 Article 91(2). All of the signatory states have now ratified, accepted or approved the Convention with the exception of Ghana, Poland, Singapore, and Venezuela.

40 Article 91(3). A list of acceding states is contained in Appendix II.

41 Article 91(4).

42 Article 89.

43 Article 99(1).

44 Article 99(3).

(ii) Relationship with Other International Agreements

Article 90 states that the 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 the Convention, provided that the parties have their places of business in states parties to such agreement.

It is not entirely clear, however, what international agreements the Vienna Conference had in mind when it adopted the article.[45] States have themselves indicated which Conventions they believe fall under this provision. For example, upon ratifying the Convention, the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organisations of the Members Countries of the Council for Mutual Economic Assistance (Comecon) to be subject to the provisions of Article 90 of the Convention.[46]

(iii) The Hague Conventions

Article 99, which deals with the entry into force of the Convention, also addresses the issue of the relationship between the Vienna Convention and its Hague predecessors of 1964 which it is designed to supersede.[47] Paragraph (3) requires a state party to either or both of the Hague Conventions to denounce those Conventions at the time of ratification (acceptance, approval, or accession) to the Vienna Convention. Indeed, the Convention will not enter into force for those states until such time as the denunciations become effective.[48] A state party to the Hague Conventions effects denunciation by notifying the depositary government of the Netherlands to such effect.[49] A number of denunciations have now been made[50] and the Government of the Netherlands is itself of the opinion that it is no longer advisable for states to become a party to the Hague Conventions.[51] Article 99(4) provides that a state party to ULIS which becomes a party to the Vienna Convention but declares that it will not be bound by Part III dealing with formation of contract shall denounce ULIS. Similarly, a state party to ULF may denounce it alone on becoming a party to the Vienna Convention by declaring itself not bound by Part III.[52]

These Conventions have been important in the practice of five of the six original members of the European Community.[53] More significant is the fact that the provisions of the Vienna Convention have their origins in the Hague Conventions,

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45 Winship in *Kritzer*, p551.

46 Information supplied by Eric E Bergsten, Secretary, UNCITRAL.

47 On the issue of the relationship between the Vienna Convention and the Hague Conventions of 1964 see generally: M Ndulo, 'The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' 38 ICLQ 1 (1989); R Monaco; 'Relationship Between the Two Conventions on Sale Adopted at the Hague in 1964 (ULIS and ULFC) and the Future Conventions Resulting from the Work Being Done by UNCITRAL' 3 Italian YB Int'l L 50 (1977).

48 Paragraph (6).

49 Paragraph (3).

50 Italy, Germany and the Netherlands.

51 Information supplied by HJM Bredt, Head of the Treaties Publication Section, Ministry of Foreign Affairs of the Netherlands.

52 Article 99(5).

53 *Id.* France, the sixth original member of the EC, was involved in the drafting of ULF and ULIS but ultimately decided against ratification.

however radical the revision has been. The legislative contribution of ULF and ULIS therefore continues to be of relevance, particularly for the purpose of identifying the rationale behind individual provisions of the Vienna Convention.

(iv) Reservations

Upon becoming a party to the Convention, a state may make a number of specific reservations which have the effect of limiting the application of the Convention vis-a-vis that particular state. Above and beyond these specific instances, contracting states are not permitted to make reservations. The objective of creating a uniform law would clearly be frustrated if states could pick and choose among the provisions applying to transactions coming within their competence. Authorised reservations to the Convention are secured by a series of declarations made in accordance with Articles 92 to 97:

Article 92: A state may preclude application of Part II or Part III of the Convention.

Article 93: A federal state may declare the Convention applicable to some rather than all of its territorial units.

Article 94: The Neighbouring States Clauses permits two or more states which have the some or closely related legal rules on international sales to limit or exclude the application of the Convention to trade vis-a-vis each other.

Article 95: A state may declare that it is not to be bound by Article 1(1)(b) which determines the applicability of the Convention on the basis of rules of private international law.

Article 96: A state may preserve a domestic formality to the effect that contracts, their modification or termination, must be in writing.

Article 97: This provision lays down the procedures which must complied with for a declaation to become effective.

Declarations under Articles 94 and 96 may be made at any time whereas declarations under Articles 92 and 93 may be made at the time of signature, ratification, acceptance or approval. If made at the time of signature, however, they must be confirmed upon ratification, acceptance or approval in order to remain effective.[54] An Article 95 declaration may be made at time of the deposit of the instrument of ratification, acceptance, approval or accession. Declarations and confirmations thereof must be in writing and formally notified to the depositary.[55] They will generally enter into force simultaneously with

54 Article 97(1).
55 Article 97(2).

entry into force for the state concerned[56] and may be subsequently withdrawn only by a formal notification in writing addressed to the depositary.[57]
Despite the prohibition of reservations other than those expressly authorised by the Convention, it remains open to states to make what are known as interpretative declarations on becoming a party to the Convention. Unlike reservations, these declarations do not purport to modify the treaty obligations assumed by the state but rather to clarify the position of the state with regard to any interpretative or other uncertainty which may be apparent. The only example of such a declaration submitted in the context of the Vienna Convention to date is the declaration by the Government of Hungary, upon ratification, that it considered the General Conditions of Delivery of Goods between Organisations of the Member of Comecon Countries to fall within Article 90 of the Convention.

(v) Denunciation
A state which has become a party to the Convention may denounce it, or may denounce Part II or Part III alone, by a formal notification in writing to the depositary to that effect.[58] Unless a longer period of time is prescribed in the notification, the denunciation will take effect twelve months after the notification is received.[59]

Support for the Convention
In total, thirty-four states have signed and ratified or acceded to the Convention. Four states have merely signed the Convention. In addition, Belgium, Greece, and the United Kingdom are taking steps toward becoming parties.[60] Projections indicate that the participation of states will continue to increase steadily in the coming years. Support has also been forthcoming from international trade associations across the globe. The key factor which distinguishes the Vienna Convention, however, is the character of its support. States and associations across the North-South and East-West divides have endorsed the Convention, giving it a truly international following.

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56 Article 97(3). Where formal notification is received after entry into force of the Convention in respect of the state concerned, the declaration will enter into force on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

57 Article 97(4). The withdrawal will take effect six months later. Having regard to Article 94 declarations, the time frame for entry into force will run from the receipt of the latest declaration of the depositary. Article 97(5) states that withdrawal of an Article 94 declaration by one state renders inoperative any reciprocal declaration.

58 Article 101(1).

59 Article 101(2).

60 Information provided by Eric E Bergsten, Secretary, UNCITRAL.

CHAPTER 9: FORMATION OF THE CONTRACT

Introduction

Part II of the Convention contains the rules governing formation of contract, and is a direct descendant of ULF. Articles 14 to 17 set out the uniform law concerning the offer, and the following five articles, the acceptance. The closing articles of Part II, Articles 23 and 24, deal with the question of time.[1] The basic thrust of the Convention's rules on formation will be familiar to the Irish lawyer, although difficulty may lurk behind the detail of some of the provisions of Part II. The most notable contrast between the common law and the Convention is the emphasis in the former, and the absence in the latter, of the doctrine of consideration.

I OFFER

Criteria for an Offer

The Convention gives expression to the basic requirement familiar to Irish law that the offeror must indicate to another an intention to be bound in case of acceptance. Article 14 articulates three specific criteria for an offer. First, the requirement of one or more specific addressees, secondly, the notion of definiteness and thirdly, proof of the requisite intention. The existence of an offer is dependent upon evidence of all three elements. At the same time, however, it is clear that the three requirements are inter-related and, in particular, that proof of definiteness and a specific addressee will assist in the establishment of an intention to be bound.

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1 For a comparison with the General Conditions of the Council for Mutual Economic Assistance (Comecon) see HL Shishkevish, 'The Convention on Contracts for the International Sale of Goods and the General Conditions for the Sale of Goods' 12 Georgia J Int l & Comp L 451 (1982).

Specific Addressee(s)

In respect of public offers Article 14(2), takes the view that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria of an offer and the intention that it be an offer is clearly indicated.[2]

Definiteness

According to paragraph (1), an offer is sufficiently definite if it does the following:

(1) indicates the goods;

(2) expressly or implicitly fixes or makes provision for determining the quantity; and

(3) expressly or implicitly fixes or makes provision for determining the price.

Quantity and price may be expressly fixed or implied from the surrounding circumstances.[3] For example, the price may be determinable by reference to the market price at some future date, such as the date of delivery.

These three factors constitute the basic minimum requirement of definiteness although the presence of additional terms, whether express terms of the contract or extrinsic matters will obviously assist in establishing the existence of an offer having regard not only to this requirement but in addition vis-a-vis the criterion of an intention to be bound.[4]

The provisions of the Convention relating to price fixing requirements are somewhat confused. A first reading of Article 14(1) suggests that formation of contract will not occur unless the price is fixed or a means for its determination is expressly or implicitly provided for in the proposal. Nevertheless, the signatories to the Vienna Convention appear to suggest in Articles 55 and 56 of the Convention, by articulating the implications to be drawn in case of open-price contracts that failure so to fix or make provision for the price is not fatal.

Intention to be Bound

The last of the three criteria on the basis of which a proposal may be deemed to constitute an offer is the requirement that there be an intention on the part of

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2 *Secretariat Commentary*, p20.

3 *Id.* The Commentary further considers the issue of contracts "by which one party agrees to purchase, for example, all of the ore produced from a mine, or to supply, for example, all of the suppliers of petroleum products which will be needed for resale by the owner of a service station". In some legal systems these arrangements are classified as contracts of sale, while in others they are termed concession agreements "with the provisions in respect of the supply of goods to be considered to be ancillary provisions". The conclusion reached is that, regardless of domestic classification, these arrangements are enforceable in accordance with Article 14.

4 *Secretariat Commentary*, p21.

the offeror to be bound in case of acceptance. The existence of the intention ultimately rests on a circumstantial evaluation based on the fulfilment of the other Article 14 criteria and on all of the other factual evidence surrounding the individual case in accordance with Article 8.[5] This process is all the more crucial in instances where the contract emerges from a series of on-going negotiations rather than a single exchange of communication. The intention to be bound refers only to the eventuality of acceptance and therefore is not an intention to proffer an irrevocable offer.[6]

When an Offer Becomes Effective

Article 15 provides that an offer becomes effective when it reaches the offeree, and may be withdrawn, even if it is irrevocable, if the withdrawal reaches the offeree before or at the same time as the offer. The term "reaches" in the context of communication of an offer to the offeree relates to the notion of delivery rather than that of dispatch. Under Article 24, the offer may be deemed to have reached the offeree if delivered to the offeree's place of business or mailing address (or in the absence of either of these, habitual residence) even though there may be some passage of time before he or she actually becomes aware of the communication.

Revocability of Offer

While Article 15 precludes the possibility of withdrawal of an offer after it has reached the offeree, as a general rule, however, an offer may be revoked until such time as the contract is concluded. Paragraph (1) of Article 16 evokes the common law stance which permits revocation of an offer until such time as the acceptance has been posted or dispatched. It is the time of dispatch rather than the time at which acceptance reaches the offeror which is crucial.[7] In the case of oral acceptance or of acceptance by performance of an act,[8] the power of the offeror to revoke terminates at the time of the conclusion of the contract, that is, at the time of the giving of the oral assent or the time of the performance of the act indicating assent.[9]

The operation of the general rule in Article 16(1) is greatly restricted by Article 16(2) which represents a compromise with the civil law tradition and a potential trap for the common lawyer.[10] The offeror may not revoke his or her offer in either of two cases: firstly, where the offeror indicates that the offer is

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5 JC Kelso, 'The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms' 21 Columbia Journal of Transnational Law 529 (1983) at 53.

6 *Secretariat Commentary*, p21.

7 This is the only instance in which dispatch indicates the appropriate time. The moment of receipt is crucial for the validity of acceptances generally.

8 Article 18(3).

9 With regard to this provision, the *Secretariat Commentary* states at p22: 'The value of a rule that a revocable offer becomes irrevocable prior to the moment at which the contract is concluded lies in the fact that it contributes to an effective compromise between the theory of general revocability of offers and the theory of general irrevocability of offers. Although all offers except those which fall within the scope of [Article 16(2)] are revocable, they become irrevocable once the offeree makes his commitment by dispatching the acceptance'.

10 *Reinhart*, p98.

irrevocable and, or secondly, where the offeree has acted in reliance on the offer in circumstances where it was reasonable to do so.[11] The application of Article 16(2) is a good example of the dangers inherent in interpreting the Convention on the basis of particular domestic doctrines.[12]

Termination of Offer by Rejection

Rejection by the offeree releases the offeror of any commitment on foot of the original offer and leaves the offeror free to contract with others. As a general rule, once the rejection reaches the offeror, the offeree will not be in a position to change his or her mind subsequently and dispatch a valid acceptance. Article 17 extends this rule to both revocable and irrevocable offers despite the fact that some legal systems do not recognise termination of an irrevocable offer by rejection.

II ACCEPTANCE

Criteria for Acceptance

The criteria for acceptance of an offer are laid down in Article 18. Paragraph (1) of Article 18 makes clear the fact that the means of proffering assent to an offer are not limited to statements but rather extend to other forms of *conduct* which might *indicate* assent. Silence or inactivity does not in itself amount to acceptance, although coupled with other factors it may suggest acquiescence.

Paragraph (2) determines that at the moment at which the indication of assent reaches the offeror, the acceptance becomes effective. Article 24 provides, as a general rule, that the fact of delivery is the indication of assent. The parties may, of course, derogate from or vary the effect of this rule under Article 6, for example, by determining that some specific means and manner of assent will signify acceptance. In addition, Article 18(3) sets out a specific exception to the general rule, namely, that the performance of an act based on usage or on an established practice between the parties may constitute acceptance without any further need for notice to the offeror. The moment of performance of that act then becomes the crucial time. However in the case of both the general rule and the exception, respectively, the notice must reach the offeror or the dat must be performed within any time period which has been fixed or, in the absence of this latter eventuality, within a reasonable time.

Introduction of a rule requiring receipt of an acceptance represents a departure from the common law position. Under the common law, where parties intend that an acceptance is to be communicated by post, the "postal rule" indicates that acceptance is complete when the offeree *posts* the letter of acceptance.

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11 *Secretarial Commentary*, p22.

12 K Sono, "Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?" 21 Cornell Int'l LJ 477 (1988).

Two further departures from the common law are apparent. First, the rule on risk of loss or delay of an acceptance at common law would allow for the conclusion of a contract in circumstances where there is none under the Convention.[13]

Secondly, the distinction between revocable and irrevocable offers has implications not only for the time at which the offer becomes effective but correspondingly for the time at which the acceptance becomes effective. With the common law, offers are revocable until accepted and acceptance is effective at the time of postal dispatch, whereas, in the case of an irrevocable offer, the acceptance must reach the offeror before legal consequences will follow. The common law has not decided whether an acceptance may be recalled before it reaches the offeror; there is in fact no English or Irish decision on this point.[14] Under the Convention, however, notice of withdrawal overtaking the acceptance will operate to release the offeree from the consequences of an otherwise valid and effective acceptance.[15]

The Battle of the Forms

Article 19 is designed to overcome the potential conflict which occurs when the parties use different standard printed forms as the basis for their contract.[16] Irish law is very complex in this area and the leading English decision is indecisive.[17] The contribution of the Convention to the problem raised has been described as "a very small" one.[18] Article 19(2) provides that a reply to an offer which purports to be an acceptance of an offer, but contains additional or different terms which do not materially alter the terms of an offer, constitutes an acceptance, unless the offeror objects to the discrepancy. If there is no objection, the terms of the contract are the terms of the offer, with the modifications contained in the acceptance. Much of difficulty stems from the fact that, while phrases such as "additional or different terms" or "materially alter" contained in paragraph (2) articulate the principle in paragraph (1), these terms are defined so broadly in paragraph (3) that the whole area still remains ambiguous.

Resolution of the battle of the forms in the context of the Vienna Convention may involve the interplay of a number of articles and considerations of domestic

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13 Farnsworth in *Kritzer*, at p 174.

14 The dictum of Lawton J in *Holwell Securities v Hughes* [1974] 1 WLR 155 that the postal rule "does not operate if its application would produce manifest inconvenience and absurdity" might be of use in the future, as no hardship would be produced by this result. See *Clark*, pp11-13.

15 Winship in *Kritzer*, at p174.

16 See F Vergne, "The Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods" 33 Am J Comp L 223 (1985); RS Rendell, "The New UN Convention on International Sales Contracts An Overview" 15 Brooklyn J Int'l L 23 (1989) at pp28-29; C Moccia, "The United Nations Convention on Contracts for the Sale of Goods and the Battle of the Forms" 13 Fordham Int'l LJ 649 (1990).

17 *Butler Machine Tool Co v Ex-Cell-O Corp* [1979] 1 WLR 401. This decision turned on the sellers' tactical error in returning a signed acknowledgment slip, which the court held was an acceptance of the buyers' terms. There is no way of knowing which way the court would decide without the return of such a signed slip.

18 *Nichols*, p217. He recognises, however, that "even within domestic systems any solution to the problem is controversial [so that] it was not to be expected that an international body would be able to make a radical contribution. Nor perhaps was it to be desired".

law. A court may, for example, have to decide whether an issue of validity is involved such as to remove the matter from the ambit of the Convention and bring it within domestic law. If applied, issues of interpretation of the Convention's provisions will arise. There are three interpretations of the Convention's approach to the battle of the forms. According to the first view, the issue may be addressed by general principles found within the Vienna Convention removing any need to make reference to domestic law. Another view suggests that the Convention fails to provide an adequate solution, leaving courts with no alternative but to rely on domestic law. A third approach considers the battle of the forms to be an issue of validity pursuant to Article 4 and therefore solely a matter to be resolved by domestic law.

Faced with an acceptance containing additional or different terms, an offeror has a number of options.[19] First, the offeror can forward the goods to the buyer, in which case those terms will become part of the contract. Secondly, the offeror can take no action, in which case the original offer will be effective provided that the additional or different terms are not material. Alternatively he or she can object to the modifications and place the onus for response back on the offeree.

Time Limits

Article 18(2) indicates that in order for an acceptance to become effective, it must reach the offeror "within the time he has fixed". Article 20 attempts to dispel some of the ambiguity or confusion that may surround the offeror's stipulation that acceptance must be proffered having regard to limitations as to time by providing guidance as to the interpretation to be applied to the offeror's statements, for example that a period of time fixed by the offeror for acceptance begins to run from the moment the telegram is handed in or from the date shown in the letter.

Late Acceptances

As a general rule, therefore, a late acceptance is ineffective. Article 21(1) empowers the offeror to render it effective by informing the offeree without delay. The offeror may be able to utilise this mechanism to his or her advantage should market forces be operating in his or her favour; nevertheless this potential benefit "is balanced by the fact that the offeree could in the meanwhile have withdrawn the acceptance under Article 22".[20]

In a situation falling under Article 21(2) where written communication containing the late acceptance shows that it was forwarded in circumstances in which it would have reached the offeror in the normal course of events, an onus falls on the offeror to inform the offeree without delay that the offer is considered to have lapsed.

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19 *Rendell*, p29.

20 UK Department of Trade and Industry Consultative Document on the *United Nations Convention on Contracts for the International Sale of Goods*, June 1989, p27.

As regards withdrawal of acceptance Article 22 provides that the withdrawal must reach the offeror before or at the same time as the acceptance would have become effective. Finally, Article 23 provides that a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the Convention.

CHAPTER 10: SALE OF GOODS

Introduction

Part III of the Vienna Convention deals with the rights and obligations of the parties to an international contract for the sale of goods. The question as to whether a contract has in fact been concluded obviously precedes the application of Part III. The issue of formation will have been settled in accordance with Part II of the Convention or, in a case involving a contracting state which has made a declaration under Article 92(1) that it will not be bound by Part II, the existence of a contract will have been established by reference to the applicable domestic law. The general provisions contained in Part I of the Convention apply in respect of Part III.

Part III is divided into five chapters. The first is entitled "General Provisions" and deals with a number of miscellaneous matters such as fundamental breach, and modification or termination by agreement of the parties. Chapter II outlines the obligations of the seller and the remedies available to the buyer in case of breach of contract by the seller. The corresponding provisions dealing with the obligations of the buyer and remedies of the seller are contained in Chapter III. The fourth chapter addresses the issue of the passing of risk in international contracts for the sale of goods. Finally, Chapter V entitled "Provisions Common to the Buyer" deals with anticipatory breach, damages, interest, exemptions, effects of avoidance and preservation of the goods.

Obligations of Parties

The respective duties of the seller and the buyer are outlined in Part III of the Convention. The seller is obliged to deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and Convention. The buyer must pay the price of the goods and take delivery of them as so required.

The Convention outlines in some detail the various aspects of the particular duties of the parties. The seller is generally required to deliver goods of the quantity, quality, description and packaging called for in the contract. The buyer is expected to examine the goods as soon as is practicable and to give notice of any non-conformity within a reasonable time. The seller is under an obligation to deliver goods which are free from any claim by a third party, including claims based on intellectual property, such as those based on patents and trademarks. In order to discharge the duty to pay the price, the buyer must take such steps and comply with such formalities as may be required to enable payment to be made. Similarly, the duty to take delivery consists not only of actually taking over the goods but also of doing all the acts which could reasonably be expected in order to enable the seller to take delivery.

Remedies

Although based on the same premise, the remedies which are available to the buyer and seller are set out in separate sections of the Convention. The spectrum of potential relief varies depending upon whether the breach can be classified as fundamental on the basis of two criteria. In order to be fundamental, the breach must result in such detriment to the other party as substantially to deprive that party of what he or she is entitled to expect under the contract. Secondly, the result must be such that it was not foreseen by the party in breach nor would have been foreseen by a reasonable person in the same circumstances.

In the case of an ordinary breach of contract, the aggrieved party has a number of options. As a general rule and subject to certain conditions, he or she may seek an order for compliance or specific performance, avoid the contract, or claim damages. In certain circumstances the buyer may, in addition, reduce the price or require the seller to repair defective goods. Avoidance becomes an option where there has been a fundamental breach or where a party in breach has failed to perform within an additional reasonable period of time fixed by the aggrieved party. In fact, the contract may be avoided ahead of a fundamental breach where it is clear that the other party will commit such a breach. A buyer may require a delivery of substitute goods but only where the goods delivered were not in conformity with the contract and the lack of conformity amounted to a fundamental breach.

The Convention does expect the aggrieved party to take all reasonable steps to reduce the damage and accordingly damages will not be recoverable to the extent to which this could have been done. In addition, a party will not be liable for failure to perform any of his or her obligations if it can be shown that the failure was due to an impediment beyond his or her control which he or she could not reasonably have been expected to tackle. Special rules exist in respect of anticipatory breach and in respect of the right to suspend performance.

Fundamental Breach

The concept of fundamental breach lies at the heart of the Convention's scheme of remedies. Provisions concerning avoidance of contract,[1] the right to require substituted goods,[2] the ability of the seller to cure the defect,[3] and the passing of risk[4] all relate back in some measure to Article 25. This Article provides that a breach is fundamental if it results in such detriment to a party as substantially to deprive the party of his or her expectations under the contract, unless the result was unforeseeable by the party and by a reasonable person in the same circumstances.

The UK Consultative Document makes the following observation with respect to Article 25:

> "This formula was the outcome of much discussion but, as with comparable formulations in English and Scots Law, the question is essentially whether the breach is one of such seriousness as to justify avoidance. The formula is inevitably a broad one and in applying it courts are no doubt likely to be influenced by the methods to which they are accustomed".[5]

Notice of Avoidance

Article 26 provides that a declaration of avoidance is effective only if made by notice to the other party, and that the contract is avoided at the time when notice of the declaration of avoidance is given to the other party.

The Convention does not require, as do some legal systems, that an advance notice be given of the intention to declare the contract avoided. Only one notice is necessary, the notice of the declaration of avoidance. The notice can be oral or written and can be transmitted by any means. Provided the means chosen are appropriate, Article 27 provides that a delay or error in the transmission of the notice does not impair the legal effect of the notice.[6]

Risk of Delay or Error in Communication

Article 27 does however place the risk of delay, error or loss in communication on the person to whom the communication is addressed. Communication can be a communication given in accordance with the Convention, or where there is more than one means of communication available to the sender, the one which

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1 Articles 49(1)(a), 51(2), 64(1)(a), 72(1), 73(1), 73(2).
2 Article 46(2).
3 Articles 37 & 48.
4 Article 70.
5 *Op cit*, p29.
6 *Secretariat Commentary*, p27.

is the most appropriate may be used.[7] Appropriateness in this instance is measured against the individual situation or circumstances of the parties.

This rule in Article 27 is in line with the situation where dispatch of acceptance constitutes acceptance of an offer (the common law "postal rule" discussed above). Where receipt of a communication accepting an offer constitutes acceptance, however, this reverses the burden which falls on the offeree.

Specific Performance

Article 28 enables each system to preserve its own approach to specific performance by providing that a court is not bound to enter a judgment for specific performance unless the court would do so under its own law. Common law courts retain their discretion while, at the same time, the obligatory nature of specific remedies is retained in civil law systems.[8] This provision arises from the divergent common law and civil law views of specific performance. While the common law system classifies specific performance as a discretionary remedy, civil law systems tend to grant specific relief as of right.

This Article is necessitated by the wording of Articles 46 and 62. The former provides that the buyer may require performance by the seller of his or her obligations. Under the corresponding provision of Article 62, the seller is entitled to require the buyer to pay the price, take delivery or perform his or her other obligations.

Modification or Abrogation of the Contract

Article 29 provides that a contract may be modified or terminated by the mere agreement of the parties, except where this procedure is expressly excluded by a written provision in the contract.

Article 29(1) therefore seeks to bridge the gap between the civil law stance whereby an agreement to modify even in respect of the obligations of only one of the parties is valid provided that there is sufficient cause, and the common law requirement of consideration in respect of such a modification.[9]

Under paragraph (2), where a contract in writing contains a provision requiring any modification or termination by agreement to be in writing, effect must be given effect to it. This recognises by implication that, except to that extent, the modification or variation of an agreement required to be in writing need not itself be in writing, thus reflecting the common law position.

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7 *Id.*

8 *UK Consultative Document*, p31.

9 *Secretariat Commentary*, p28. The commentary makes the point that "[m]any of the modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 27(1) are effective, thereby overcoming the common law rule that consideration is required".

Article 29(2) in tandem with Article 11 preserves domestic requirements of evidence in writing, in this instance with regard to modification or termination of an agreement.

II OBLIGATIONS OF THE SELLER

Introduction

The basic statement of the seller's obligations is set out in Article 30. The obligations to deliver the goods and transfer the property is basic to all legal systems, although the requirements concerning methods and means of enforcement may differ.[10] Priority is given to the requirements of the contract in advance of those of the Convention.[11] Chapter II of Part III is made up of three sections which expand on the statement in Article 30. Section I deals with the delivery of the goods and the handing over of documents and Section II with the conformity of the goods and third party claims. The final section sets out remedies for breach of contract by the seller.

Delivery of the Goods

The place of delivery is vital in a number of respects and is therefore usually the subject of specific agreement between the parties. The Secretariat Commentary claims that in order for the seller to deliver the goods he or she must, in the case of specific goods, deliver the exact goods called for in the contract and, in the case of unidentified goods, deliver goods which generally conform to the description of the type of goods called for by the contract.[12] In the absence of agreement, Article 31 lays down rules as to the place of delivery for various types of contract.

Contracts of Sale Involving Carriage

The bulk of contracts for the international sale of goods and certainly those transactions which may be termed shipment contracts and destination contracts, involve the carriage of goods. Where such a contract makes explicit reference to the place at which the goods are to be delivered or by use of a trade term specifies such a place, the obligation to deliver will relate to such a contractual term. In other cases, Article 31(a) provides that the contractual obligation with respect to delivery consists of handing over of the goods to the first carrier for transmission to the buyer. This provision links up with Article 67(1) which determines that in the case of contracts involving carriage the risk passes to the buyer at this time. The approach is supported by mercantile practice[13] and

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10 F Enderlein, "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods", Dubrovnik Lectures, p133.

11 *Id*, p143.

12 *Secretariat Commentary*, p29.

13 *Honnold*, para 208. For example, UCC section 2-509(1).

reflected in *Incoterms*.[14]

In this context, the place of taking delivery must be distinguished from the place of destination. The two may be the same. On the other hand, should they differ, the place of delivery is significant for the purpose of Article 31 whereas the place of destination is significant with regard to the buyer's obligation to examine the goods in accordance with Article 38(2).[15] Additional obligations of the seller in the case of a contract involving the carriage of goods are contained in Article 32.

Contracts of Sale Not Involving Carriage

Article 31(c) provides that in cases of sales which do not involve carriage end where the seller is not bound to deliver the goods at any other particular place, the seller must place the goods at the buyer's disposal at the seller's place of business at the time of the conclusion of the contract. If the seller has more than one place of business, the appropriate one is the place of business 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.[16]

Subparagraph (c), however, operates as a residuary clause and applies only to cases falling outside subparagraph (b). This latter provision covers situations in which the goods are located in a particular place which was known to the parties at the time of the conclusion of the contract. The seller's contractual obligation with respect to delivery is to place the goods at the buyer's disposal at that place. A number of diverse instances may come within subparagraph (b) depending upon whether the goods are specified goods, or unidentified goods to be drawn from a specific stock or goods to be manufactured or produced. The crucial factor is that of knowledge on the part of the seller and buyer as to the location of the goods or stock or place of manufacture or production, at the time of the conclusion of the contract. Such knowledge must be actual rather than merely imputed.[17]

Shipping Arrangements

Article 32 details various functions of the seller in the case of contracts of carriage. Paragraph (1) concerns instances where the goods which are the subject of the contract have not been identified from a large consignment at the time of the handing over of the goods to a carrier. Article 32(1) places an obligation on the seller to provide information concerning the goods to the buyer. The seller usually gives the buyer such notice as a matter of commercial

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14 A set of international rules for the interpretation of trade terms published periodically by the International Chamber of Commerce.

15 *Enderlein*, p146.

16 Article 10(a).

17 *Secretariat Commentary*, p29.

practice.[18] The information will be necessary, for example, to enable the buyer to take out insurance on the goods in transit, if required. If the seller fails to identify the contract goods or to send the buyer notice of the consignment which specifies the goods, the risk of loss or destruction will not pass,[19] and the buyer will be in a position to avail himself or herself of the full range of remedies for breach. Paragraph (3) of Article 32 emphasises the obligation on the part of the seller, who is not obliged to insure to provide all available and necessary information to the buyer who requests it, in order to enable the buyer to effect the necessary insurance.

Article 32(2) makes it clear that, in the case of contracts where trade terms require the seller to arrange for contracts of carriage (for example, CIF contracts) or in cases where the parties agree that the seller will make such arrangements, the seller must make such contracts as are necessary for appropriate transportation in accordance with the usual terms for such transportation.

Time for Delivery

The fixing of a period of time within which delivery must take place is a common feature of international sale of goods transactions, and is governed by Article 33 of the Convention. The subsequent specification by the parties of a date for delivery will remove the operability of the time period. The use of a time period may predicate the subsequent election by the buyer of a delivery date. In such an instance, the seller must be given notice of the delivery date in adequate time to make the necessary arrangements. A seller who has not been afforded adequate notice could marshal a defence to a claim of liability for failure to perform a contractual obligation in accordance with Article 79(1).[20] The question of early or partial delivery is addressed in Articles 51 and 52 of the Convention which determine that such delivery is a breach of contract. This is subject to the seller's right to cure defects in conformity with the contract, as allowed under Article 37.

In all other cases delivery must be effected within a reasonable time after the conclusion of the contract:

> "[w]hat is a reasonable time depends on what constitutes acceptable commercial conduct in the circumstances of the case".[21]

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18 *Enderlein*, p149.

19 Article 67(2).

20 Article 79(1) declares that 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.

21 *Secretariat Commentary*, p31.

Documents Relating to the Goods

Article 34 affirms the dominance of the contract. It will itself determine the documents which the seller will hand over to the buyer.[22] Similarly, the details as to the hand-over of the documents will be determined by the contract. Article 34 extends the seller's right to cure a defective delivery to the delivery of documents. Means of curing the non-conformity are not specified.[23]

Conformity of the Goods

Article 35 sets out the basic obligation of the seller regarding the conformity of the goods. The seller is obliged to hand over or place at the disposal of the buyer goods which correspond with the general contractual description. This duty stands independent of the seller's obligation under Articles 41 and 42 to deliver goods free from any right or claim of a third party. Even where the goods are actually delivered by the seller, the buyer retains remedies for non-conformity in accordance with Article 45(1).[24]

In the absence of agreement between the parties, requirements in respect of quality are outlined further in paragraph (2). In the case of goods ordered by general description, the seller must provide goods which are fit for the purposes for which goods of the same description would ordinarily be used. The test is an objective one based on "the normal expectations of persons buying goods of this contract description" and extends to goods purchased for resale as well as goods purchased for use.[25]

The seller will be obliged to furnish goods which are fit for a particular purpose where the buyer has expressly or impliedly made that purpose known to the seller at the time of the conclusion of the contract. If the buyer has in mind a use which is not an ordinary use, he or she must convey it to the seller at this time. The obligation to supply goods fit for a particular purpose made known to the seller does not operate in circumstances where the buyer did not rely, or where it was unreasonable to rely, on the seller's skill and judgment.

Article 35(2)(c) deals with a situation where goods are held out as a sample or model and obliges the seller to furnish goods which correspond with the sample or model.[26] Sellers will be released of any such duty if they indicate that the sample or model is different from the goods to be delivered.[27] Clearly the sample or model will not prevail in a case where the description in the contract is clear and unambiguous.[28] Paragraph (d) confirms that obligations with

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22 These documents might include, documents of title, bills of lading, warehouse receipts, and insurance policies.

23 *Enderlein*, p154.

24 *Id* p32.

25 *Secretariat Commentary*, p32.

26 Article 8 provides that statements 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. In other cases, statements and conduct 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.

27 *Secretariat Commentary*, p32.

28 *Enderlein*, p157.

respect to the quality of goods also cover packaging.

The provisions of Article 35 are designed to give effect to the reasonable expectations of the buyer as regards the conformity of the goods to the contract.

However, paragraph (3) recognises that a buyer who knew or could not have been unaware of a lack of conformity at the time of conclusion of the contract cannot subsequently argue that the seller is liable for breach of duty to furnish goods that conform. This exception, only operates in respect of subparagraphs (a) to (d) of paragraph (2). The basic obligation on the part of the seller to perform by delivering goods which are of the quantity, quality and description required by the contract is set out in paragraph (1). Failure to perform this fundamental obligation will expose the seller to liability.

Damage to Goods: Effect on Conformity

The general rule concerning goods that are damaged on arrival is contained in paragraph (1)of Article 36. The seller is liable for any apparent or latent defects that exist at the time of the passing of risk from the seller to the buyer.[29] Once the risk has passed, the buyer must assume responsibility for any damage that occurs. Moreover, the onus would appear to rest on the buyer to prove that the lack of conformity already existed at the time of the passing of the risk.

Paragraph (2) covers a lack of conformity resulting from a breach of any of the seller's obligations. The seller will remain liable where he or she has given undertakings or guarantees that extend beyond the time when the risk normally passes.

Right to Cure up to the Date for Delivery

Article 37 gives the seller the right to cure any deficiency or fault in the goods up to the date of delivery. This provision reflects the pragmatic objective of the Convention that the contract should be performed in so far as it is possible and reasonable to expect the parties to complete the bargain. Failure to perform contractual obligations successfully may ultimately result in financial and other loss for both parties. Provision is therefore made for the correction of reparable shortcomings in the quantity or quality of the goods. There are a number of provisos, however. First, the exercise of the seller's right to cure a defect must not prejudice the buyer by causing him or her unreasonable inconvenience or expense. Secondly, the buyer will not, in any event, be deprived of the right to claim damages. Thirdly, and most importantly, the seller may correct a defect only up to the time of delivery. At that time, and not before that time, the buyer is entitled to take action on foot of expectations of conformity.

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29 Articles 66 to 70 deal with the passing of risk.

Time for Examination

The buyer is not only given the right but is in fact obliged to examine the goods under the provisions of Article 38. The examination may be carried out by another on the buyer's behalf. The length of period for examination and the method employed appear to depend on the circumstances. It would also seem that only patent defects are covered.

The location of this provision in the Convention indicates the importance to both parties of the examination of the goods. The seller, in addition to the buyer has an interest in knowing that the buyer is satisfied, and may take appropriate measures if that is not the case.

Notice of Lack of Conformity

In the case of patent defects, the time when the buyer ought to have discovered the lack of conformity is the time when the buyer is obliged to examine the goods in accordance with Article 38.[30] The lack of conformity can relate to quantity, quality or description. If notice is not given within a reasonable time, the buyer can no longer rely on the lack of conformity, but may be forced to retain the goods and pay the price. If the defects are latent, the time of discovery of the non-conformity could be "the time of commencement of the use of the goods, the time of putting them into operation or even later". In any event, the maximum possible period is two years. However, if a contractual guarantee has been granted by the seller for a different period of time, the latter provision will prevail.[31] The buyer's notice should be sufficiently detailed to enable the seller to exercise the right to cure under Article 37.

Article 40 similarly precludes the application of Article 39 in the seller's favour if the lack of conformity relates to facts of which he or she knew or could not have been unaware and which he or she did not disclose to the buyer. Article 44 provides an excuse for failure to notify. It states that, despite the provisions of Articles 39(1) and 43(1),[32] the buyer may reduce the price[33] or claim damages, except for loss of profit, if the buyer has a reasonable excuse for his or her failure to give the required notice. Risk of transmission rests with the seller in accordance with Article 27.

Third Party Claims

Article 4 declares that the Convention does not apply to the issue of property in the goods sold. It follows that the position of a *bona fide* purchaser where there is a defect in the seller's title is a matter for domestic law. The Convention is concerned solely with third party claims as they affect the buyer. Although third party rights are dealt with by the Convention, only rights in relation to title, such

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30 *Enderlein*, p170.
31 *Id*, pp171,173.
32 Articles 41 to 43 address the issue of third party claims.
33 In accordance with Article 50.

as reservations of title or pledges (Article 41) and rights in relation to intellectual property (Article 42) are covered. The important time is that of delivery, at which point the goods must be free from third party rights and claims. Of course, the buyer may agree to take the goods subject to such claims.

Article 43 obliges the buyer to notify the seller of third party rights within a reasonable time. The obligation is not merely to give notice but also to specify the nature of the right or claim so as to enable the seller taking appropriate steps to protect the interests of the parties against the third party.[34]

III REMEDIES OF THE BUYER

Introduction

Article 45 sets out in paragraph (1) the buyer's remedies where the seller fails to perform his or her contractual obligations. The mechanics of the particular remedies are articulated in the articles referred to in subparagraphs (a) and (b). The language of subparagraph (b), in particular, emphasises that contractual breach alone raises an entitlement to claim damages:

> "By this language the Convention rejects the view that one who fails to perform his contract is not responsible in damages unless he has been negligent - an approach with an uneasy history in domestic law".[35]

A further objective of Article 45 is to settle the issue of election between remedies. Paragraph (2) clarifies that opting for one remedy does not exclude recourse to another. A claim for damages remains a possibility despite an exercise of a right to other remedies. Fundamental breaches fall into a distinct category for which particular remedies are available.

Articles 45(3) and 61(3) provide that, when a buyer or seller resorts to a remedy for breach of contract, no period of grace may be granted by a court or arbitral tribunal for the buyer or seller to perform their contractual obligations.

Buyer's Right to Compel Performance

Article 46 emphasises the range of options available to the buyer where there is a contractual breach on the part of the seller. Commercial realities may be such that the buyer cannot be adequately compensated by a successful claim for damages, ultimate performance by the seller being the buyer's key concern. Paragraph (1) accordingly provides that the buyer may require performance by the seller of his or her obligations. This general provision is in contrast to Irish law in which specific performance of sale of goods transactions is a discretionary remedy. We have already seen that civil law, on the other hand, tends to favour specific performance as a general rule. The divergent character of domestic rules

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34 *Enderlein*, p184.
35 *Honnold*, para 276.

is in fact reflected in the provisions of the Convention. Entitlement to specific performance under Article 45(1) must be measured against the provision of Article 28 that a national court is not obliged to grant specific performance where it would not do so under its own laws.

As a general rule, the buyer is entitled to seek specific performance, although certain provisions of the Convention place limits on the ability of the buyer to compel performance. Most of limitations are set out in Article 46 itself. The right will be denied where the buyer has resorted to a remedy which is inconsistent with his or her relying on it. Avoidance is, for example, inconsistent with specific performance.[36] Where there is a delayed performance, a claim for damages may still remain open. Paragraphs (2) and (3) of Article 46 deal with two specific instances of specific performance. A buyer may compel delivery of substitute goods only where the lack of conformity constitutes a fundamental breach. In addition, resort to this remedy must be preceded by notice. There is greater flexibility to compel the seller to remedy a lack of conformity by repair in accordance with paragraph (3). Once again there is a requirement of notice. Moreover, the buyer will not be permitted to require the seller to repair where to do so would be unreasonable "having regard to all circumstances". For example, the buyer may be in a better position to carry out minor repairs. Beyond the provisions of Article 46, other bars to specific performance may exist within the setting of the Convention, for example, provisions on preservation and disposal of the goods and on mitigation of loss.[37]

Buyer's Notice Fixing Additional Final Period for Performance

Article 47 allows the buyer to grant an additional period of time to the seller to comply with his or her obligations. This period of grace stems from the civil law concept of *Nachfrist*, which is foreign to common law lawyers.[38] Essentially *Nachfrist* is the right of either party to fix and additional period of time of reasonable time for performance by the other party of their obligations under the contract, and stems from a German institution of that name.[39] Granting this additional period of grace does not deprive the buyer of the right to claim damages for delay in performance.

The buyer can declare the contract avoided only if the seller does not deliver the goods within the additional period of time.[40] The period of time must be a reasonable one. Moreover, for a period of time to be fixed in accordance with Article 47(1) it seems that reference must be made to a specific date or time period. General demands, such as a request for prompt performance, will not suffice.[41]

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36 Article 81 provides that avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due.

37 Articles 85, 86, 88(2) and Article 77, respectively. See *Honnold*, para 285.

38 *Reinhart*, p99.

39 Nicholls, "The Vienna Convention on International Sales Law" (1989) 105 LQR 201, at 225.

40 Article 49(1)(b).

41 *Secretariat Commentary*, p39.

Resort to other remedies on the part of the buyer is suspended for the duration of the additional time period.[42] However, the buyer retains a right to claim damages for delay in performance. Comparable rights of the seller in the case of the buyer's delayed performance are contained in Article 63.

Cure After Date for Delivery

Article 48(1) sets out a fairly broad licence to remedy a failure to perform. However, the power to remedy is subject to some limitations. First, the remedy must be possible without unreasonable delay amounting to a fundamental breach of contract. Secondly, there must similarly be no risk of unreasonable inconvenience or uncertainty of reimbursement of expenses incurred by the buyer. Thirdly, the seller may not remedy a failure to perform if the buyer has declared the contract avoided. Once the failure has been remedied, the buyer is precluded from making such a declaration.

Paragraph (2) recognises that on-going communication between the parties is normal practice. Where a seller proposes that he or she will remedy a lack of performance, he or she may interpret the buyer's failure to respond within a reasonable time as acquiescence and proceed with his or her performance. However, the seller must specify a particular time period in his or her proposal within which performance will be achieved. Paragraph (3) confirms that notice of such performance within a specified time period is assumed to include a request for a response from the buyer confirming that she or he will accept. During this period of time, the buyer is precluded from relying on remedies such as avoidance which would be inconsistent with the seller's performance. In the course of transmitting such notice, it is the seller who bears the risk of the failure to reach the buyer. Moreover, the buyer's reply will be effective on dispatch.[43]

Buyer's Right to Avoid the Contract

Article 49 establishes two distinct grounds upon which avoidance can be based. The first is the case of a fundamental breach of contract and the second the situation of non-delivery by the seller after an additional time period has elapsed. Avoidance is not automatic, but is effected by a mere declaration, and must be carried out within a reasonable time. The reasonable time period commences at the time when the party avoiding the contract knew or ought to have known of the breach or from the expiry of the *Nachfrist* period.[44] According to Article 81(1), avoidance has the effect of releasing the parties from their obligations, although the issue of damages may be left outstanding. Performance in whole or in part may entitle a party to claim restitution.[45]

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42 Article 47(2).
43 Article 27. *Secretariat Commentary*, p41.
44 *Nichols*, p226.
45 *Id*, p227.

Reduction of the Price

Article 50 provides that the buyer may reduce the price of nonconforming goods, even when the price has been paid, to the value the goods actually had at the time of the delivery. This remedy stems from a doctrine used to mitigate the harshness of rules on damages in the civil law, and may therefore be new to those familiar with the common law.

The decisive time is the time of the delivery of the goods and not the time of the conclusion of the contract "as in some national systems".[46] The place or market for the price comparison is not specified. The place of delivery or perhaps the place of destination may be the relevant place, depending on the circumstances of the individual case.

Non-Conformity of Part of the Goods

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, Article 51 permits the buyer to avoid the contract 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.

Early Delivery and Excess Quantity

Article 52 recites two specific instances where the buyer has an option to accept or refuse to take delivery of goods which are presented, that is where the goods are delivered before the date fixed, and where the quantity delivered is greater than the contractual amount. The rationale for the option to refuse under Article 52(1) is the inconvenience or expense which may stem from early delivery. Nevertheless, the buyer is not obliged to show that he or she is, or will be, thus prejudiced. The fact of early delivery is sufficient to entitle the buyer to refuse to take delivery should he or she so wish. Should the buyer exercise the option to refuse delivery, he or she may still be required to take possession of the goods on behalf of the seller in accordance with Article 86(2). Four conditions underlie this obligation:

> "(1) the goods have been placed at his disposal at their place of destination, (2) he can take possession without payment of the price, eg. the contract of sale does not require payment in order for the buyer to take possession of the documents covering the goods, (3) taking possession would not cause the buyer unreasonable inconvenience or unreasonable expense, and (4) neither the seller nor a person authorised to take possession of the goods on his behalf is present at the destination of the goods".[47]

The buyer's duty flows from a general obligation to take all reasonable steps towards preservation of the goods on the understanding of subsequent

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46 *Enderlein*, p197.

47 *Secretariat Commentary*, articulating the provisions of Article 86(2).

reimbursement by the seller of all corresponding necessary expense.[48]

Article 52(2) permits the buyer to accept or refuse delivery of any excess quantity. Should the buyer accept it, or part of it, he or she must tender payment at the contract rate for the excess. Difficulty may, however, occur in cases where the seller's tender does not allow the buyer to accept the contract amount and refuse the excess. The seller may, for example, tender a single bill of lading to cover the entire shipment.[49] In such a situation the buyer may be able to assert that such delivery constitutes a fundamental breach entitling him or her to avoid the contract. Alternatively, he or she may take delivery and claim damages in respect of any loss or expense suffered.

IV OBLIGATIONS OF THE BUYER

Introduction

Chapter III, outlining the obligations of the buyer, closely resembles the preceding Chapter II in terms of structure. It is divided into three sections, the first two dealing with specific duties resting on the buyer and the third setting out remedies available to the seller in case of the buyer's breach of contract. Article 53 is a basic introductory statement of the buyer's obligations. Articles 54 to 59 concern the nature and extent of the buyer's obligation to pay the price, and Article 60, the obligation to take delivery of the goods. The issue of the seller's remedies is addressed in Articles 61 to 65. Chapter III is supplemented by the provisions in Chapter V, common to the obligations of the buyer and the seller.

The provision in Article 53, that the buyer must pay the price for the goods and take delivery of them as required by the contract and the Convention, corresponds to the general statement and summary of the seller's obligation contained in Article 30, emphasising that the duties resting on the party stem from both the contract and the Convention. The Convention is silent as to many details concerning the buyer's obligations. These matters should for the most part be covered by the contract or by practice and usage. As a last resort, reference may be made to domestic law to fill any outstanding gaps.

Generally speaking, provisions dealing with the buyer's obligation to pay the price and to take delivery of the goods are not likely to trouble lawyers in this jurisdiction.[50] Nevertheless, the issue of payment, in particular, is often at the centre of disputes in international sales. Once again, matters will frequently be dealt with and provided for in the contract, to which the Convention plays a supplementary role.

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48 Article 86(1).
49 *Honnold*, para 320.
50 *Nichols*, p223.

Payment of the Price: Enabling Steps

Under Article 54 the buyer is required not merely to transfer payment at the appropriate time and place but, in addition, to ensure that all prerequisites to such payment are fulfilled. It follows that failure to carry out any step which is required to enable payment to be made will expose the buyer to liability for breach of contract. Should such a breach be considered fundamental, the seller may declare the contract avoided.[51] Even if the breach is not fundamental, the seller may in any event be entitled to take this course of action if he has fixed an additional period of time for performance by the buyer of his obligations[52] and the buyer has failed to carry out steps to facilitate payment during this time.

Articles 55 and 56 deal in some measure with the question of the calculation of the price. Although detailed provisions on price-calculation are not included in the Convention, a number of provisions may point to certain conclusions.[53] For example, the statement in Article 35(2)(d) that the goods do not conform with the contract unless they are packaged in the usual manner could be considered to imply that the seller may include the cost of packaging in his calculation of the price. The same principle may apply to costs of transportation.[54]

Place for Payment

Unless the contract states otherwise or there is a practice between the parties or established usage, the general rule is that the buyer must discharge his or her obligation to pay the price at the seller's place of business, except in the case of payment against the handing over of goods or documents, in which instance the appropriate place is the place where the handing over takes place. This is the generally accepted approach in international trade.[55] Where the seller has more than one place of business, the relevant one is the place which has the closest relationship with the contract and its performance. This criterion is evaluated on the basis of the contract and its performance as a whole and not merely having regard to the payment of the price.

Article 57(2) places the burden on the seller of discharging any incidental expense which has been caused by a change in his or her place of business subsequent to the conclusion of the contract. It would appear that the fact of any such change does not affect the buyer's obligation to tender payment at the appropriate time and place.

Time for Payment

Paragraph (1) of Article 58 sets forth the basic principle of concurrent exchange of the goods for the price. Contracts involving carriage of the goods are the

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51 Article 64.

52 In accordance with Article 63(1).

53 L Sevon, 'Obligations of the Buyer under the UN Convention for the International Sale of Goods' in *Dubrovnik Lectures*, 203 at p211.

54 *Id*, at p212.

55 *Honnold*, para 331.

norm and in this scenario concurrent exchange takes place, not when the goods are handed over to a carrier, but when they reach the buyer. The seller may accordingly require that such handover is dependent upon concurrent payment of the price.

The obligation resting on the buyer to pay the price does not actually arise until he or she has been afforded an opportunity to examine the goods. As a result, "[i]t is the seller's obligation to provide a means for the buyer's examination prior to payment and handing over".[56] In addition, payment must be made without the need for request by the seller.

Buyer's Obligation to Take Delivery

The buyer's obligation to take delivery as laid down in Article 60 includes the obligation to co-operate with and facilitate the seller in the discharge of his or her obligation to deliver the goods. In addition, the buyer must actually take over the goods.

V REMEDIES OF THE SELLER

The remedies made available to the seller by virtue of Articles 61 to 65 are essentially the same as the remedies available to the buyer in Article 45, namely the right to compel performance, the right to affix an additional period for the buyer to fulfil his or her obligations, the right to avoid the contract, and the right to supply missing specifications. The conditions for the operation of these remedies are also similar to those required of the buyer.

VI PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND THE BUYER

Suspension of Performance

Article 71 addresses the issue of a threat of non-performance by either party. Faced, after the conclusion of the contract, with evidence that the other party will not perform a substantial part of her obligations, a party may suspend performance of obligations.

> "However, it is not sufficient that this is foreseeable on the basis of a subjective evaluation of one of the parties and may also be a ground for abuse. Instead, the Vienna Convention insists on two additional conditions: a serious deficiency in his ability to perform or in his creditworthiness; or his conduct in preparing to perform or in performing the contract".[57]

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56 *Secretariat Commentary*, p46.

57 J Vilus, 'Provisions Common to the Obligations of the Seller and the Buyer' Dubrovnik Lectures, 239 at p241.

In circumstances where the threat of non-payment comes to light after the goods are dispatched and before they are handed over and where the seller has not retained control over them, the seller may prevent the handing over of the goods to the buyer.[58] Article 71(3) provides that a party who has suspended performance must resume it if the other party provides adequate assurance that he will carry out his obligations. Such assurance must take the form of "concrete facts or action that removes the threat" which provided the original grounds for suspension.[59] The Convention does not specifically address the question of the impact of suspension and resumption of performance on the time-scale for completion of the contract.

Avoidance Prior to the Date for Performance

Immediate avoidance of the contract is permitted in the special cases falling under Article 72, although the requirements are more stringent than in the case of suspension. Article 72 allows a party to avoid the contract prior to the date for performance where it is clear that the other party will commit a fundamental breach. In the absence of a declaration that the party will not perform, avoidance at this time may be premature and unwise. A wrongful declaration of avoidance may entitle the other party to insist on performance or to rely on his or her own right to avoid the contract.

Measure of Damages

The common law rules for measuring damages for breach of contract have largely been adopted by the Convention in Article 74 as the general rule for measuring damages in these cases. Accordingly, there is little new ground for the Irish lawyer. Neither do the rules governing the measure of damages when a contract is avoided depart significantly from the common law.

Most legal systems do, in fact, permit an aggrieved party to claim damages in addition to an exercise of the right to avoid the contract. Article 75 provides that the replacement purchase or the resale must be carried out in a reasonable manner and within a reasonable time after avoidance. This means that the buyer must buy the goods at the lowest possible price and seller sell them at the highest possible price.[60] Where there was no purchase in replacement or resale, Article 76 provides that the party claiming damages may 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. The time of avoidance of contract may be difficult to ascertain in practice, however, thereby exposing the provision to abuse.[61] Article 76 provides that in cases of avoidance after the taking over of the goods, the current price at the time of the taking over is to be applied.

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58 *Honnold*, para 390. Article 71(2) represents a substantial revision of Article 73, paragraphs (2) and (3) of ULIS.
59 *Id*, para 392.
60 *Vilus*, p249.
61 *Id*, pp249-50.

A party relying on a breach of contract is also required to take measures to mitigate the loss.

Exemptions

The provision of exemption from liability is important and is generally the subject of special rules in domestic law. The Convention recognises, in Article 79, that a party may be unable to proceed with the contract in light of a change of circumstances beyond that party's control, and provides an exemption from liability in those circumstances or where the party's failure is due to the failure of a third person. Although there was agreement as to the principle, the detail of the provision was the subject of lengthy negotiation and drafting. The text ultimately adopted represents the middle ground between approaches based on objective and subjective conditions.

Effects of Avoidance

Article 81(1) gives expression to the general principle that avoidance releases both parties from their obligations under the contract. However, the phrase 'avoidance of the contract' standing alone overstates the consequences of this remedy. As we have seen, avoidance does not release a party from his obligation to pay damages for breach of contract.[62] The consequences of avoidance are narrowed by the provisions of Article 81, with specific reference to arbitration and restitution.

Buyer's Inability to Return Goods in Same Condition

The right to declare avoidance of the contract or demand substitute delivery is lost if restitution becomes impossible. This will occur where the buyer is in a position to make restitution of the goods "substantially" but not identically in the condition in which they were received. The phrase "substantially" is, however, not defined. Where the buyer is precluded from avoiding the contract or requiring substitute delivery of the seller, he or she may nevertheless maintain an action for damages in respect of the breach of contract on the part of the seller.[63]

Despite the general rule in paragraph (1), there are three exceptional instances in which the buyer may avoid the contract or require the delivery of substitute goods even though it is impossible for him or her to make restitution. These exceptions cover situations in which the buyer should not be considered responsible for the deterioration in the state of the goods. First, the buyer will not lose the right to such remedies where the impossibility does not stem from the buyer's own act or omission. The buyer is therefore under a duty to exercise due and reasonable care. However, this exception appears to be broad enough to excuse the buyer where the damage has arisen in the normal course of events, where it can be traced to the seller or presumably where it was caused by third

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62 *Honnold*, para 441.

63 Articles 74 to 76.

party action which the buyer could not reasonably have been expected to prevent.

The second exception under paragraph (2) covers a situation in which the deterioration has resulted from the action of the buyer but where the buyer had merely been performing her or his obligation to examine the goods in accordance with Article 38. The exception would not cover an examination of the goods which went beyond the contemplation of the contract or of that article. Hence the goods, or part of them, must have perished or deteriorated "as a result of the normal examination of the goods". Thirdly, the buyer may declare the contract avoided or seek delivery of substitute goods, despite the impossibility of making restitution, where he or she has resold or consumed the goods or part of them. This exception must be read in conjunction with Article 84(2), under which the buyer must account to the seller for all benefits derived from the goods. The resale or consumption must have occurred in the normal course of business and before such time as the lack of conformity actually came, or ought to have come, to the attention of the buyer. Article 70 recites a fourth exception, namely that, in cases where the seller has committed a fundamental breach of contract, the passing of risk of loss under Articles 67 to 69 does not impair the remedies available to the buyer on account of such breach.

Preservation of other Remedies

Article 83 provides that a buyer who has lost the right to declare the contract avoided or require the delivery of substitute goods retains all other remedies provided for in the contract and in the Convention. These remedies include the right to recover damages,[64] to require the seller to remedy, by repair, a lack of conformity,[65] and to reduce the price.[66]

Restitution of the Benefits Received

Article 78 provides for entitlement to interest as a means of compensating one party for the other's breach of contract. Article 84(1) obliges the seller to pay interest, in case of avoidance, as restitution for benefits received. It therefore covers situations in which the seller is in breach and, in addition, those in which the buyer is in breach. For example, a seller will be required to pay interest on money received where he or she has declared the contract avoided on account of the buyer's failure to pay the balance of the purchase price. "Hence, in applying Article 84(1) it would be appropriate to look to the cost (or value) of the use of money at the seller's place of business, rather than in the buyer's locale".[67]

Paragraph (2) of Article 84 precludes the possibility of the buyer is retaining a benefit beyond the basic objective of avoidance, which is release of his or her

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64 Articles 45(1)(b), 74, 75, and 76.
65 Article 46(3).
66 Article 50.
67 *Honnold*, para 451.

obligation to pay the contract price. Where the buyer must make restitution, the buyer is also obliged to account to the seller for any benefits that he or she has derived from the goods or part thereof. The situation contemplated in Article 84(2)(b)is more glaring. Where the buyer has resold or consumed the goods in the normal course of events so that it is impossible to make restitution, he or she may nevertheless be permitted to declare the contract avoided or seek a delivery of substitute goods under Article 82(2)(c). The buyer may not, however, retain the benefit of use of the goods, on the one hand, as well as avoidance or substitute delivery on the other. Hence the buyer must account to the seller for the benefits of the resale or consumption in the event that he or she should opt to declare the contract avoided or require substitute delivery. The obligation is to account for benefits which the buyer has derived from the goods and therefore relates not to sums agreed between the parties in the context of, or market prices estimated at the time of, the original sale, but rather to actual benefits subsequently accruing to the buyer. Equally, should the revelation of a lack of conformity after consumption or resale lead to loss or expense for the buyer, he or she will be obliged to account to the seller only for the balance of benefits received. To the extent to which Article 84 requires one party to make restitution (or restitution in kind) to the other party who is in breach, the former aggrieved party may also be entitled to recover damages in accordance with Articles 81(1) and 83.

CHAPTER 11: RISK AND THE PRESERVATION OF THE GOODS

I PASSING OF RISK

Provision is frequently made in the contract to determine when the risk for loss or damage to the goods should pass from the seller to the buyer. In the absence of any such provision, the Convention tackles the issue in some detail. Generally speaking, the risk passes to the buyer at the time the goods are taken over or, if he or she fails to take delivery in breach of contract, at the time when the goods are placed at his or her disposal. However, the goods must be linked to the contract before they can be deemed to be placed at his or her disposal and the risk can be considered to have passed to him or her. In the case of a contract involving the carriage of goods, the risk generally passes when the goods are handed over to the first carrier for transmission to the buyer. Where goods are sold in transit, the risk passes at the time of the conclusion of the contract.

The question of the time at which risk passes from the seller to the buyer is vital in a number of respects. We have observed, for example, that liability for any lack of conformity is determined as of that time.[1] Its significance is such that the passing of risk is generally the subject of express treatment in the contract itself or impliedly by the use of trade terms. In the context of the Convention, the need for clarity of approach on the issue of the passing of risk was particularly important because of the diversity of domestic rules.

Article 6 the Convention lays down the fundamental rule that loss or damage to the goods after risk has passed to the buyer does not discharge the buyer of his or her obligations. The actual mechanics of the passing of risk are dealt with in subsequent Articles. Article 67 details the rules for risk when the contract

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1 Article 36(1).

involves carriage, that is contracts which require or authorise the seller to arrange for the goods to be carried and where the carriage is performed by a third party. If the seller is bound to hand over the goods at a particular place, the risk passes at the time of the hand over at that place. In cases where there is no such specificity as to a place, the risk passes at the time and place of the handover to the first carrier for transmission. That actual handover may be performed by the seller or, by another person acting on his or her behalf or upon the seller's instruction:

> "The policy of the article is that risk should pass at the beginning of the agreed transit, the buyer being normally in a better position than the seller to assess any damage which occurred in transit and to pursue claims in respect of it".[2]

The seller may be obliged by the terms of the contract to insure the goods. In any event, Article 32(3) states that the seller must provide the buyer, at his or her request, with all available information necessary to enable him or her to effect insurance.

Sale of Goods During Transit

For goods sold during transit, Article 68 provides that the risk passes at the time of the conclusion of the contract but the risk is assumed by the buyer from the time of the handover of the goods to the carrier who issued the documents embodying the contract of carriage "if the circumstances so indicate". This phrase lies at the heart of the provision but its application is not defined and could therefore admit of wide or narrow interpretation.

General Residual Rules on Risk

Article 69 covers cases "where it is anticipated that the buyer will take possession of the goods and arrange for any necessary transport himself, either in his own vehicles or in public carriers".[3] In those circumstances, risk passes to the buyer when the buyer takes the goods or when the goods have been placed at the buyer's disposal and he or she fails to take delivery. When the seller is in fundamental breach of the contract, however, Article 70 provides that this may prevent risk passing to the buyer in the normal way.

II PRESERVATION OF THE GOODS

The final section of Part III of the Convention sets out four provisions designed to ensure that, regardless of the existence of disputes between the parties preventing or delaying performance, efforts will be taken by both sides to ensure that the goods will be preserved. Section VI, therefore, continues the theme,

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2 *Nichols*, p138.

3 *Secretariat Commentary*, p85

established by the provisions concerning the passing of risk, that loss or damages should be prevented or kept to a minimum by obliging the party in the best position to exercise control to ensure the safety of the goods.

Seller's Duty to Preserve the Goods

Article 85 makes logical provision for a situation in which the buyer is in delay in taking delivery and the seller is in physical possession of the goods or in a position to control their disposition if they are in the hands of a third party. In the words of the *Secretariat Commentary*, it is "appropriate" that the seller be required to take reasonable steps to preserve the goods for the benefit of the buyer and that the seller be entitled to retain them until such time as he or she has been reimbursed for his or her reasonable expenses.[4] This duty of the seller has special significance in the context of the seller's right to recover the full price under Article 62.[5] At common law, a seller who remains in possession is not entitled to require specific performance and is generally compelled to redispose of the goods and seek damages for breach of contract. In such a circumstance the seller will be encouraged to take care to preserve the goods by motivations of self interest. In contrast, since the Convention envisages a scenario in which the seller may recover the purchase price directly from the buyer rather than being compelled to dispose of the goods by way of resale, Article 85 obliges the seller to exercise due care in respect of the goods which he or she is, in effect, taking care of on the buyer's behalf.

Buyer's Duty to Preserve the Goods

Article 86 represents the corresponding statement of the buyer's duty to exercise due and reasonable care of the goods when they are in his or her physical possession or under his or her control, as when the goods have been received or placed at the disposal of the buyer and the buyer intends to exercise his or her right to reject them. Clearly the duty to preserve the goods does not arise where the right to reject has been exercised before the goods have reached the buyer or left the hands of the seller or agent. Once the buyer has taken possession of the goods, he or she becomes responsible for their safety and must take reasonable steps for their preservation on the seller's behalf.

Methods of Preservation

Articles 87 and 88 articulate some of the practical implications of the duty common to both parties to protect the goods when they are under their control pending completion or suspension of the contract. Preservation may be secured by placing the goods in a third party warehouse, provided that this does not lead to unreasonable expense. It may be that it is either unreasonable to expect a party to maintain and preserve the goods or indeed that it is impossible for him

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4 Albert H Kritzer, *Guide to the Practical Application of the United Nations Convention on Contracts for the International Sale of Goods*, 1989, p359.

5 See *Honnold*, para 454.

or her to do so. Article 88 indicates that the duty to preserve is not unlimited.

This seems sensible in that the party on whom the duty rests is essentially the aggrieved party, temporarily in possession of the goods until such time as his or her chosen remedy involving the transfer of the goods can be effected. An unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or cost of preservation, therefore, entitles the party who is bound to preserve the goods to sell them. The only condition precedent to this sale is the giving of reasonable notice of any intention to sell.

In contrast, a party will be obliged rather than merely empowered to sell the goods where their continued preservation is impossible due to rapid deterioration or where it would involve unreasonable expense. This is consistent with the general principle that loss should be minimised. The duty to preserve the goods translates into a duty to sell where this is the only effective means of achieving this objective. The duty to sell is, however, not absolute. The party is merely obliged to take reasonable measures to sell the goods, having given reasonable notice to the other party of the intention to sell. The proceeds of a sale carried out on foot of Article 88 must be passed on to the other party, minus the cost of expenses incurred for preservation and resale.

An action by the seller to require the buyer to pay the price affords a good example of a situation in which unreasonable expense will necessitate a sale of goods. In these circumstances, the expense of prolonged storage pending the outcome of litigation would be unreasonable.[6]

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6 *Id*, para 457.

CHAPTER 12: RECOMMENDATIONS

Introduction

This chapter seeks to outline a response to two key questions:

(1) Should Ireland accede to the *United Nations Vienna Convention on Contracts for the International Sale of Goods 1980*?

(2) If a decision is made in favour of accession, should Ireland submit one or more reservations to accession by way of declarations pursuant to Articles 92 to 96?

A decision as to whether Ireland should accede will ultimately be based on a broad range of factors. From a legal perspective, our primary concern relates to the changes which the Convention would introduce into Irish law as it currently stands and to the question of whether such changes would serve to reform Irish law and to facilitate the Irish trader doing business on the international market. These changes have been examined in detail in preceding chapters.

Implementation

Since the Convention is, of its nature, a *uniform* law on the international sale of goods, questions which usually surround the domestic implementation of an international convention do not arise as such. The contracting states to the Convention are obliged to apply its provisions to their respective spheres of influence without recourse to reformulation at the domestic level. This process of incorporation is brought about by the introduction of a domestic statute enabling the Convention to enter into force in the particular state and giving expression to the text of the Convention itself. The only discretion which a state enjoys is with respect to the reservations to the Convention that a state is permitted to make. These reservations can be utilised as a means of limiting the

application of its provisions in a number of specific circumstances. Where relevant, domestic legislation will deal with this eventuality. In addition, it will cater for any changes in domestic law which are necessitated by the implementation of the Convention.

The following is a closer examination of the experience to date of some of the contracting parties to the Convention:

(i) Common Law Countries

(a) United States

Since 1978, the United States has had a uniform law for international contracts. Enacted in all US states except Louisiana, the *Uniform Commercial Code* covers a wide range of issues connected with the formation and substance of international sale of goods transactions. Although a participant in the Hague Conference which led to the conclusion of ULF and ULIS in 1964, the United States did not become a party to either Convention. Representatives of the United States were, however, actively involved in the development of the Vienna Convention. Having signed the Convention on 31 August 1981, the United States ratified it on 11 December 1986 whereupon it entered into force for the United States and ten other states on 1 January 1988.

In a letter dated 30 August 1983, submitting the Vienna Convention to the President, Secretary of State Schultz explained:

> "Sales transactions that cross international borders are subject to legal uncertainty - doubt as to which legal system will apply and the difficulty of coping with unfamiliar foreign law. The sales contract may specify which law will apply, but our sellers and buyers cannot expect that foreign trading partners will always agree on the applicability of United States law. Insistence by both parties on this sensitive point can prolong and jeopardise the making of the contract.
>
> The Convention's approach provides an effective solution for this difficult problem. When a contract for an international sale of goods does not make clear what rule of law applies, the Convention provides uniform rules to govern the questions that arise in the making and performance of the contract.
>
> ...
>
> The usefulness of the Convention is enhanced by the fact that its rules were specially fashioned to meet the problems and needs of international trade. Our sellers and buyers must cope with foreign statutes and codes that were prepared a century or

more ago, and were designed for domestic sales that bear little resemblance to current international transactions. Even when these problems have been resolved by case-law, such developments are often unknown or inaccessible to our lawyers ...".[1]

Upon ratifying the Convention, the Government of the United States declared pursuant to Article 95 that it would not be bound by subparagraph (1) of Article 1. The impact of this reservation is to narrow the scope of the Convention by ensuring that the Uniform Commercial Code rather than the Convention applies when the governing law is deemed to be US law under the rules of private international law. In a case involving a US based trader and a foreign based trader who does not have his place of business in a Contracting State, for example, the reservation has the effect of leaving the parties in the position they would have been in had the US not become a party.

The feeling was that it was more important to secure Senate approval and ultimately ratification of the Convention even with a limited scope of applicability, than to risk rejection of the entire package on the controversial point of substituting the Convention for US law as the applicable law for international sale of goods transactions on a general basis.[2]

(b) United Kingdom

A participant in the Hague Conference of 1964, the United Kingdom is one of the small number of states which ratified both ULF and ULIS.[3] These two Conventions were incorporated into UK law by way of the *Uniform Laws on International Sales Act 1967*.[4] Upon ratification of ULIS, the UK submitted a reservation limiting the application of the Convention to contracts in which the parties have chosen it as governing law. ULIS therefore only applied to the extent to which the UK trader and his or her foreign trading partner had "contracted in" to the Convention.[5] The success of the Hague Conventions from the UK perspective appears to have been negligible. The Department of Trade and Industry reported in 1989 that it has found:

"no reported case in the English, Scottish or Northern Ireland Courts involving the Hague Conventions and it would appear that the business community here have made little or no use of

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1 Information supplied by Mr Peter H Pfund, Assistant Legal Adviser for Private International Law, Office of the Legal Adviser. The letter from Secretary of State Schultz to President Ronald Reagan and the accompanying legal analysis of the Convention are reprinted in 22 *International Legal Materials* 1368-80 (1984).

2 *Id.*

3 Other parties to the Convention were Belgium, Gambia, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino.

4 The Act incorporated the Conventions into English, Scottish and Northern Irish Law.

5 In accordance with Article 5 of ULIS.

them in practice".[6]

Following the adoption of the Convention by the Vienna Conference in 1980, and its subsequent opening for signature by states, the Department canvassed the views of interested parties on the practical participation of the UK in the Convention. Any final decision on ratification was deferred pending the reactions of the UK's major trading partners.[7] Toward the close of the 1980s, the matter was again raised for discussion, primarily in response to the entry into force of the Convention in January 1988 and the submission of instruments of ratification by several of the UK's major trading partners. In June 1989, the Department published a Consultative Document as a means of inviting all interested parties to submit their observations on the desirability of the UK becoming a party to the Convention.[8]

At that time the Department of Trade and Industry identified at least three possible advantages in accession to the Convention by the UK. The first advantage would be the possibility of traders in the UK availing themselves of the desirable increased degree of uniformity in the system of law applying to international sale of goods transactions stemming from the application of the Convention. Secondly, the operation of the Convention from the UK perspective "could obviate the necessity in some cases for difficult decisions to be made by the Courts as to which country's law should be applied to a contract", thereby avoiding prolonged and expensive litigation.[9] A third advantage in the view of the Department would be the possible participation of UK courts and arbitrators in the interpretation and development of the Convention.[10] Although the Consultative Document concedes that certain articles in the Convention could involve uncertainty and lead to diverse interpretation at a domestic level, it points out that few examples had been offered to the Department of situations in which UK traders might be prejudiced by the operation of the Convention. Moreover, on a practical level, it was recognised that lawyers and traders in the UK would be required "to familiarise themselves with the provisions of the Convention, become aware of possible pitfalls and decide which provisions it would be desirable to exclude or amend in their contracts".[11]

The Department of Trade and Industry are currently preparing a submission to put before government Ministers recommending accession to the Convention. It is not clear on what terms this accession is

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6 Department of Trade and Industry Consultative Document on the *United Nations Convention on Contracts for the International Sale of Goods*, June 1989, at p8.

7 *Id*, p2.

8 *Id*, p1.

9 *Id*, p10.

10 *Id*, p11.

11 *Id.*

recommended. Given the time needed to enact necessary legislation, and the time lag between accession and the coming into force of the Convention, it would, in any event, be a year or two before the Convention came into operation between Britain and other states.[12]

On the question of declarations which may be made upon accession, the provisional view of the Department of Trade and Industry at that time, was as follows. First, there was no obvious advantage in limiting the scope of the Convention by making a declaration under Article 92 that the UK would not be bound by either Part II or Part III of the Convention.[13] This is particularly apparent in light of the fact that the UK ratified both ULF and ULIS. In contrast, the preliminary conclusion reached was that a declaration should be made under Article 95 to the effect that the UK would not be bound by subparagraph (1)(b) of Article 1. The Convention would therefore apply only to contracts in which one party has his or her place of business in the UK and the place of business of the other is in another Contracting State:

> "The Convention would not apply where one contracting party had its place of business in the United Kingdom and the other in a State which was not a party to the Convention but where the law of a contracting state which would be applied to the contract in such circumstances is likely to be English, Scots or Northern Ireland law. Thus, if no declarations were made under Article 95 it would on the whole be English, Scots or Northern Ireland law which would be displaced by the Convention ... Unless the Convention is considered to be more suited to dealing with international sales contracts than existing English, Scots and Northern Ireland law there would not seem to be any advantage in allowing the Convention to operate in circumstances where English, Scots or Northern Ireland law would otherwise apply".[14]

Accession to the Convention on the part of the UK would necessitate denunciation of ULF and ULIS.

(ii) European Community

A notable feature of the participation of states in the Convention is the increasing representation of the European Community. Of Ireland's eleven fellow members of the Community, six are currently parties to the Vienna Convention. Denmark, France, Germany, Italy, Spain and the Netherlands. Belgium, Greece and the United Kingdom are actively considering accession.

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12 Information supplied by Mr. Michael Collon of the English Law Commission.
13 *Id*, p9.
14 *Id*, pp9-10.

(a) Germany

Germany signed the Convention on 26 May 1981 and ratified it on 21 December 1989. As a result, the Convention entered into force for the Federal Republic of Germany on 1 January 1991. The Convention had been signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

Germany implemented the Convention by a Federal Statute of 5 July 1989. As the new law has only recently become applicable to German exports, there are hardly any court decisions on the Convention so far.[15]

(b) The Netherlands

The Netherlands signed the Vienna Convention on 29 May 1981 and acceded to it on 13 December 1990. It entered into force for that state on 1 January 1992. Accession necessitated denunciation of ULF and ULIS to which the Netherlands was a party. The effect of such denunciation has been translated into domestic Dutch Law through the adoption of the *Uniform Act on the International Sale of Goods 1971* and the *Uniform Act on the Formation of Contracts for the International Sale of Goods 1971.*[16] The former Act is to remain applicable to contracts signed before I January 1992 while the Act on formation of contract will remain applicable to cases in which the proposal to conclude a contract was submitted before that date.[17] A further provision clarifies that the Convention shall replace Netherlands law where, in accordance with a rule of private international law, it is deemed to be the applicable law in the case of an international sale of goods transaction.[18] Specific emphasis of this provision was said to be incorporated:

> "in order to avoid any misunderstanding, in this case by courts in non-signatory countries or parties who, having a choice in the matter, elect to declare Netherlands law applicable".[19]

(c) Denmark

Danish participation in the Vienna Convention was secured through a Nordic initiative and will therefore be considered in that context.

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15 Information supplied by Dr Schrock for the Federal Minister of Justice.

16 Bulletin of Acts, Orders and Decrees 1971, 780 and 781, respectively. Information supplied by HJM Bredt, Head of the Treaties Publication Section, Ministry of Foreign Affairs of the Kingdom of the Netherlands.

17 *Id.* Section 1, paragraphs 2 and 3 respectively of a bill on *Recession of the Uniform Act on the International Sale of Goods and the Uniform Act on Formation of Contracts for the International Sale of Goods.* An Explanatory Report on the section explains that sales contracts which have been concluded before I January 1992 or the formation of sales contracts for which a tender was submitted before that date, which in accordance with Article 100 of the Vienna Convention on the sale of goods are not subject to that Convention, will continue to be governed by these Acts.

18 *Id*, section 2.

19 *Id*, Explanatory Report on section 2.

(d) France, Italy and Spain

As already noted, the Convention has been in force in the above countries, in the case of France and Italy, since January 1st 1988 and, in the case of Spain, since August 1st 1991.

Some Considerations

(1) This report is concerned only with assessing the suitability of the Convention to Irish sales which have an international dimension. It follows that the Commission is not concerned with analysing the current state of Irish law on contracts for the international sale of goods with a view to formulating independent recommendations for the reform.

(2) Nevertheless, in the context of a review of the Convention, the Commission is very much concerned with the possibility of reforming Irish law. A subsidiary objective of the Convention is that it may act as a vehicle for the reform of domestic law. A uniform law is, by its nature, the product of international compromise and while some provisions may clarify domestic uncertainties and lacunae, others may have the opposite effect. In considering whether to recommend accession, the Commission has accordingly given particular thought to the extent to which the provisions of the uniform law represent an improvement on the existing state of Irish law.

(3) The fact that the Convention has been in force for only a few years renders the process of assessment a difficult one. For example, in its brief lifetime, the Convention has generated hardly any caselaw. This fact might be thought to indicate that the operation of the Convention has not been contentious and has led to little dispute to date. Equally, it might suggest that traders in the contracting states have made frequent use of the facility of contracting out of its provisions. Arguably, it might therefore be preferable to postpone any decision on accession for some time.

(4) The concept underlying the Convention is an admirable one. By providing a uniform law of sales, it removes much of the recourse to foreign law which traders, lawyers and judges are currently obliged to undertake. Of the two possible methods of establishing uniformity and predictability in international sales, the concept of a uniform substantive law is preferable to an approach based solely on uniformity of the rules of conflict of laws. Uniformity in choice of law alone would render decisions as to the applicable law a good deal more predictable. Yet it would not obviate the need to get to grips with the provisions of a foreign law.

(5) The significant degree of support which the Convention has commanded might suggest that it does have the potential to realise, at some future time, the objective of becoming the law most frequently applied to

international sales of goods. The Convention represents a significant improvement on its Hague predecessors of 1964 which it is now regarded as having superseded. Certainly, its success to date is such that it is extremely unlikely that other attempts will be made at an international level to create another uniform law. At most, revisions of the current text might be entertained rather than consideration given to a new text, although there is no evidence at the present time to suggest that such revision is either necessary or desirable. The history of attempts to create an acceptable uniform law would tend to suggest that any future reform would be more likely to come about within, rather than outside, the framework of the Convention. Realistically, therefore, the Convention is not merely the best option in terms of a uniform law but is also the only such option. A decision whether or not to accede should be taken, not merely in the context of this particular Convention, but having regard also to the desirability of Irish participation in the broader process of establishing uniformity in the international law of sales.

(6) Support for the Convention, and the variety of its sources, is an important factor in assessing its future role in the trading community. However, it is also of practical significance when we consider the implications for Ireland of a decision against accession. The trade statistics indicate that the levels of trade conducted with states which are parties to the Convention is significant, most of Ireland's major trading partners having now become parties to the Convention. The only key exception is the United Kingdom, perhaps our most important trading partner, which is, however, at present contemplating accession. Significant also is the high level of participation among the member states of the European Community. These figures suggest an active role for the Convention in respect of international sales contracts to which Irish traders are a party.

(7) Regardless of whether Ireland accedes to the Convention, it is likely that Irish traders will ignore its operation at their peril. This is particularly apparent in light of the provision of Article 1(1)(b). A court in a contracting state may determine on the basis of rules of private international law that the law of a contracting state - now the Convention - is the law applicable to govern a transaction involving an Irish trader even though Ireland is not a party to the Convention. Accordingly, there is a need on the part of lawyers, judges and persons in commercial life to familiarise themselves with the provisions of the Convention.

(8) Becoming a party to the Vienna Convention may well create problems in addition to solving them. It is legitimate to question whether the Convention actually serves to simplify the process of contracting or whether it makes the process more complex by adding a further layer of confusion to the current law in the eyes of the Irish trader. This

confusion may stem from a number of sources. First, assuming that the Convention would be used in respect of trade with other contracting states, traditional rules will in any event continue to apply to international sales concluded with traders in non-contracting states. For business people trading with both contracting and non-contracting states, the combined impact of two sets of rules may actually serve to increase the complexity and expense. It would, of course, be possible to exclude the application of the Convention by an agreement to contract out, provided that the foreign trader could be persuaded to do so.

Secondly, it is important to recognise the fact that the limited applicability of the Convention precludes it from enjoying the status of a truly comprehensive code on the international sale of goods. This is particularly apparent having regard to its substantive field of application. The Convention is designed to govern the formation of the contract and the rights and duties of the parties. Other matters, particularly questions of validity, the passing of the property in the goods and the liability of the seller for death or personal injury caused by the goods, remain under the regulation of the applicable domestic law. A court may accordingly be obliged, first, to apply the Convention, secondly, to reach a decision as to the choice of law to govern questions not covered by the Convention, and thirdly, to apply the substantive rules of the applicable domestic law. In this way, the process of settling a dispute may become more lengthy and burdensome than is currently the case.

(9) We must not ignore the fact that there are a number of flaws in the Convention. A number of provisions may serve to confuse rather than to clarify and may be the subject of conflicting interpretations. For example, Article 14 of the Convention is unclear as to whether or not a price must be fixed before a contract is formed. Neither has the problem of the battle of the forms been resolved satisfactorily.[20] On the other hand, certain benefits and reforms would be introduced through the provisions of the uniform law. The concept of a code of rules specifically catering for international sales is a new and appealing departure for Irish law. Although not a perfect document, the Convention does represent the greatest level of compromise possible in the international community at the present time. Above all, we must bear in mind that the principle of party autonomy gives Irish traders the liberty to contract out of the Convention in its entirety or to exclude the application of any individual provision, with one limited exception, namely, the provision in Article 12 allowing a state to require that a contract be in writing. As a general rule, the freedom to contract out of the Convention allows parties to use the Convention to the degree to which they find it beneficial.

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20 See Chapter 9, footnote 16 and accompanying text.

(10) The issue of interpretation of the Convention is a significant one. The application of the Convention is not supervised by any independent court, commission or other body with the result that we must rely on the ability of domestic courts to apply the Convention having due regard to its objectives and to apply it in a manner consistent with precedents gathered by UNCITRAL. A certain degree of independence and judicial creativity will inevitably be retained by domestic courts in interpreting the Convention.

(11) Since the uniform law is incorporated in its entirety into domestic law, the process of implementation is virtually automatic and avoids complex and time-consuming drafting of legislation at the domestic level.

Conclusions

Accession

(1) **Should Ireland accede to the *United Nations Vienna Convention on Contacts for the International Sale of Goods 1980*?**
Although there are arguments both for and against accession, as discussed above, the former appear to outweigh the latter. Analysis of the provisions of the Convention and of domestic and international considerations surrounding it lead us to conclude that, on balance, it would be desirable for Ireland become a party to the Convention.

We therefore recommend that Ireland accede to the Convention and that legislation be enacted giving effect to the provisions of the Convention.

Reservations

In considering whether Ireland should avail itself of a reservation, the general observation must always be borne in mind that reservations not only reduce the impact of the Convention vis-a-vis the particular state but also serve to detract from its general standing, albeit to a limited extent.

(2) **Should Ireland make a declaration pursuant to Article 92 that it will not be bound by the provisions of Part II on formation of contract or Part III on sale of goods?**
There is no compelling reason to exclude the operation of either Part II or Part III. The arguments advanced in favour of accession apply equally to both parts. The exclusion of either the rules governing formation of contract or the rules governing the sale of goods would significantly limit Ireland's participation in the Convention. In addition, it could serve to undermine many of the objectives outlined above by increasing the necessity of dual recourse to the rules of the Convention, on the one hand, and the rules of domestic law, on the other.

We recommend that Ireland should not avail itself of the option of making a declaration under Article 92.

(3) **Should Ireland make a declaration pursuant to Article 94 that the Convention will not apply to contracts of sale or their formation where the parties have their places of business in Ireland and another specified country with the same or closely related legal rules?**
It might be argued that the Irish law as to sale of goods is sufficiently close to that of the United Kingdom and some other common law countries as to warrant a declaration under this article. However, the differences in some respects are also significant and, on balance, we are inclined to the view that no such declaration is necessary. Should the need arise in the future, it would be open to Ireland to make a declaration to this effect at any time.

We recommend that Ireland should not avail itself of the option of making a declaration under Article 94.

(4) **Should Ireland make a declaration pursuant to Article 95 that it will not be bound by subparagraph (1)(b) of Article 1?**
A declaration to this effect would have the impact of limiting the application of the Convention to contracts between parties whose places of business are in different states, both states being parties to the Convention. The Convention would not apply where rules of private international law alone point to the application of the law of a contracting state. Clearly the exclusion of Article 1(1)(b) greatly reduces the potential field of application of the Convention. On the other hand, if applied solely on the basis of rules of private international law, the Convention may extend its influence to states which have not become parties to it.

States availing themselves of this reservation appear to have been motivated by concern as to the confusion which sometimes surrounds the application of the rules governing the conflict of laws. Yet, if Article 1(1)(b) does not apply, a choice as to domestic or foreign law will in any event have to be made. In fact, by introducing the Convention as the applicable law, consideration of issues of conflict of laws may be minimised.

We have observed that a further ground of objection to Article 1(1)(b) is the fact that it implies necessarily the displacement of domestic rules on international contracts in favour of the Convention. For example, a decision by an Irish or foreign court that Irish law is the proper law to be applied in a dispute concerning an international sale would lead to the application of the Convention rather than Irish domestic rules. We take the view that there should be strong grounds for preserving the

application of domestic law in these circumstances in order to justify an Article 95 declaration. The existence within the domestic system of a modern code of rules on international sales, as for example in the United States, might constitute such grounds. However, there does not appear to be any such justification in the Irish context.

Balancing the above considerations, we therefore recommend that Ireland should not avail itself of the option of making a declaration under Article 95.

(5) **Should Ireland make a declaration pursuant to Article 96 that to the extent that Article 11, Article 29 and Part II of the Convention allow 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, they should not apply where any party has his or her place of business in Ireland?**

The 1893 Act provides that there are no special formalities prerequisite to the creation of a binding contract for the sale of goods. However, contracts valued at £10 or more are not enforceable unless one of four conditions are met:

(a) the buyer has accepted and received part of the goods;
(b) the buyer has given something in earnest to bind the contract;
(c) the buyer has given part payment;
(d) some note or memorandum in writing of the contract has been made and signed by the party to be charged or his or her agent in that behalf.

The requirement of a signed memorandum is therefore of limited application. First, it does not apply to formation of contract but only in respect of enforcement and then only in respect of contracts over the value of £10. Secondly, it has significance only if there is no evidence of consideration on the basis of grounds (a), (b), or (c). (It should, however, be remembered that contracts not to be performed within one year must also be evidenced in writing under s13 of the *Statute of Frauds (Ir) 1695*.) As to the specifics of the requirement itself, the courts have given a very wide interpretation to the nature of a note or memorandum.

One interpretation of Article 96 would suggest that it is not open to Ireland to make a declaration in light of the fact that the Irish domestic requirement relates not to formation but to enforcement. Article 96 entitles a state to exclude the application of Articles 11, 29 or Part II, all of which relate to formation.

Even if one takes the view that it is possible for Ireland to avail itself of this reservation, we consider that there is no strong reason justifying the preservation of this domestic requirement in the context of the

Convention. It seems that Article 96 has in mind more important and therefore more stringent formalities. The Irish requirement has little practical significance in the context of the international sale of goods. In any event, even within our domestic law, there appears to be some confusion and uncertainty concerning the specifics of the requirement of a signed memorandum. Similar considerations apply to modification of contractual terms and termination by agreement.

Accordingly, we recommend that Ireland should not avail itself of the option of making a declaration under Article 96.

(6) **Is it necessary to amend existing legislation to give effect to accession?** Amendment of the existing sale of goods legislation would be required in order to provide that contracts falling within the contemplation of the Convention will be governed by the implementing Act, the latter prevailing in the eventuality of a conflict.

Accordingly, we recommend that Ireland should amend the existing sale of goods legislation to this effect.

CHAPTER 13: SUMMARY OF RECOMMENDATIONS

1. Ireland should accede to the *United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980.* Legislation should be enacted to give effect to the provisions of the Convention.

2. Ireland should not avail itself of the option (under Article 92) to make a declaration excluding the application of either Part II (on formation of contract) or Part III (on sale of goods).

3. Ireland should not avail itself of the option (under Article 94) of excluding the application of the Convention in respect of contracts of sale or their formation where the parties have their places of business in Ireland and another specified country with the same or closely related legal rules.

4. Ireland should not avail itself of the option of making a declaration (under Article 95) excluding the application of the Convention where such application would be based solely on the ground that the rules of private international law lead to the application of the law of a contracting state.

5. Ireland should not avail itself of the option of making a declaration (under Article 96) preserving domestic requirements as to writing or form.

6. The existing sale of goods legislation should be amended so as to give effect to the entry into force for Ireland of the Convention.

APPENDIX I

THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Opened for Signature at Vienna, 11 April 1980

PREAMBLE

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

Part I. Sphere of Application and General Provisions

Chapter I: 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.

RULES OF INTERPRETATION

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.

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 had 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 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.

Article 20

(1) A period of time for 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.

CONTRACT OF SALE: 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 judgment 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.

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.

DELIVERY OF 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.

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 judgment;

(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 redispatched 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 the possibility of such redirection or redispatch, 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 the 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.

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 performance.

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.

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.

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 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.

TAKING DELIVERY

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonable be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

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.

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 authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass 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.

PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND THE BUYER

ANTICIPATORY BREACH AND INSTALMENT 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 instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, 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.

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 had 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 purpose 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.

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.

EXEMPTIONS

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 effects 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 non-receipt.

(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.

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 in his act or omission;

(b) if 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.

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 authorised 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.

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 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 under this Convention.

(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 n which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorised 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 that 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 becomes 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.

APPENDIX II

CONTRACTING STATES

List of Signatories[1]

STATE	SIGNATURE	RATIFICATION ACCESSION APPROVAL ACCEPTANCE	IN FORCE
Argentina 1/		19 Jul 1983	1 Jan 1988
Australia		17 Mar 1988	1 Apr 1989
Austria	11 Apr 1980	29 Dec 1987	1 Jan 1989
Bulgaria		9 Jul 1990	1 Aug 1991
Belarus 1/		9 Oct 1989	1 Nov 1990
Canada 8/9/		23 Apr 1991	1 May 1992
Chile 1/	11 Apr 1980	7 Feb 1990	1 Mar 1991
China 2/	30 Sep 1981	11 Dec 1986	1 Jan 1988
Czechoslovakia 3/	1 Sep 1981	5 Mar 1990	1 Apr 1991
Denmark 4/5/	26 May 1981	14 Feb 1898	1 Mar 1990
Ecuador		27 Jan 1992	1 Feb 1993
Egypt		6 Dec 1982	1 Jan 1988
Finland 4/5/	26 May 1981	15 Dec 1987	1 Jan 1989
France	27 Aug 1981	6 Aug 1982	1 Jan 1988
Germany */7	26 May 1981	21 Dec 1989	1 Jan 1991
Ghana	11 Apr 1980		
Guinea		23 Jan 1991	1 Feb 1992
Hungary 1/6	11 Apr 1980	16 Jun 1983	1 Jan 1988
Iraq		5 Mar 1990	1 Apr 1991
Italy	30 Sep 1981	11 Dec 1986	1 Jan 1988
Lesotho	18 Jun 1981	18 Jun 1981	1 Jan 1988
Mexico		29 Dec 1987	1 Jan 1989
Netherlands	29 May 1981	13 Dec 1990	1 Jan 1992
Norway 4/5/	26 May 1981	20 Jul 1988	1 Aug 1989
Poland	28 Sep 1981		
Romania		22 May 1991	1 Jun 1992
Singapore	11 Apr 1980		
Spain		24 Jul 1990	1 Aug 1991
Sweden 4/5	26 May 1981	15 Dec 1987	1 Jan 1989
Switzerland		21 Feb 1990	1 Mar 1991

1 As reproduced in UNCITRAL official documentation.

Syria		19 Oct 1982	1 Jan 1988
Uganda		12 Feb 1992	1 Mar 1993
United States 3/	31 Aug 1981	11 Dec 1986	1 Jan 1988
Venezuela	28 Sep 1981		
Ukraine 1/		3 Jan 1990	1 Feb 1991
U.S.S.R. 1/		16 Aug 1990	1 Sep 1991
Yugoslavia	11 Apr 1980	27 Mar 1985	1 Jan 1988
Zambia		6 Jun 1986	1 Jan 1988

*/ The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

Declarations and reservations

1/ Upon ratifying the Convention, the Governments of Argentina, Belarus, Chile, Hungary, Ukraine and U.S.S.R. stated, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the 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 , would not apply where any party had his or her place of business in their respective States.

2/ Upon approving the Convention, the Government of China declared that it did not consider itself bound by sub-paragraph (b) of Paragraph 1 of Article I and Article II as well as the provisions in the Convention relating to the content of Article 11.

3/ Upon ratifying the Convention, the Governments of Czechoslovakia and of the United States of America declared that they would not be bound by Article 1(1)(b).

4/ Upon ratifying the Convention, the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract).

5/ Upon ratifying the Convention, the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Sweden, Iceland, or Norway.

6/ Upon ratifying the Convention, the Government of Hungary declared that it considered the *General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance* to be subject to the provisions of article 90 of the

Convention.

7/ Upon ratifying the Convention, the Government of the former Federal Republic of Germany declared that it would not apply article 1(1)(b) in respect of any state that had made a declaration that that state would not apply article 1(1)(b).

8/ Upon accession to the Convention, the Government of Canada declared that, in accordance with article 93 of the Convention, that the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories.

9/ Upon accession the Government of Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it would not be bound by article 1(1)(b) of the Convention.

At the present time, thirty four states have ratified or acceded to the Convention. An additional four states have merely signed the Convention and a handful of others are taking steps toward becoming parties thereto.[2] The underlying objective of the Convention is the creation of a uniform law for international contracts for the sale of goods which is acceptable to traders across all geographical divides. From this perspective, support for the Convention may be tabled as follows:[3]

Africa	Lesotho, Zambia, Uganda, Ghana (signatory)
Americas	Canada, United States, Argentina, Chile, Mexico, Venezuela (signatory)
Asia/Far East	Australia, China, Singapore (signatory)
Europe	Finland, Norway, Sweden, Denmark, Austria, Switzerland, Belarus, Ukraine, U.S.S.R., Czechoslovakia, Hungary, Yugoslavia, Bulgaria, France, Germany, Italy, Spain, Netherlands (signatory) Poland (signatory)
Middle/Near East	Egypt, Syria, Iraq.

Suggestions have been made, that further accessions from a diverse range of states will follow thick and fast. Within the next few years an estimated forty to fifty states may be covered by the Convention.[4] Support for the Convention has

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2 Eg. Belgium, Greece and the United Kingdom. Information provided by Eric E Bergsten, Secretary, UNCITRAL.

3 Kritzer, p1.

4 *Id*, p8, quoting US State Department; UK Consultative Document, p2.

also been forthcoming from a number of international trade associations, including the International Chamber of Commerce (ICC), the Council of Mutual Economic Assistance (CMEA), and the Asian-African Consultative Committee.

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