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

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ARTICLES

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

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

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

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

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

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

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

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

A. THE CONVENTION'S SCOPE

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

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

B. THE CONVENTION'S LEGAL STATUS

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

The Convention limits the reservations and declarations that a Contracting

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

2. CISG art. 100.

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

4. CISG art. 99(2).

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

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

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

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

C. PARTIES TO THE CONVENTION

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

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

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

5. CISG arts. 92-98.

6. CISG art. 7(1).

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

8. CISG art. 6.

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

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

D. CASE LAW

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

9. CISG art. 7(1).

10. The national correspondents for the United States are Professor John O. Honnold (University of Pennsylvania Law School) and Professor Peter Winship (SMU School of Law).

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

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

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

E. RESOURCE MATERIALS

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

11. CISG art. 18(1).

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

The best English-language introductions to the Convention are:

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

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

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

F. IMPORTANT ADDRESSES

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

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

A. PROFESSIONAL RESPONSIBILITY

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

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

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

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

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

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

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

13. See CISG art. 6.

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

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

III. When Does the Convention Apply?

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

A. CONTRACTS OF SALE

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

Article 4

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

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

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

Questions about the borderline between a sale and other transactions will be similar to those that arise under domestic law. The lease of goods (e.g., computer hardware) is presumably not a sale because the lessor retains title to the goods. Similarly, to license a person to use property (if that property is a "good") probably is not to sell the property to that person. A contract to sell goods on credit with the retention of a security interest (even if called "retention of title") to secure payment of the purchase price, on the other hand, is probably a contract of sale because title eventually will pass.

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

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

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

17. CISG arts. 41-42.

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

Article 3

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

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

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

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

B. Goods

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

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

18. CISG art. 3(2).

19. CISG art. 3(1).

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

Article 2 expressly excludes several forms of property for which regulation by the Convention was thought inappropriate: sales of stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft, and electricity.²¹

C. "INTERNATIONAL" CONTRACTS COVERED

Article 1(1) of the Convention sets out the rule on when the Convention is applicable:

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 [i.e., choice-of-law rules] lead to the application of the law of a Contracting State.

In effect, this paragraph requires that the contract (1) be international, and (2) have some connection with a Contracting State. To avoid surprise, article 1(2) makes an exception when a party is unaware that the other party has its place of business in a different country.

1. *When Is a Sales Contract "International"?*

For the purposes of the Convention, a contract is international when the seller and buyer have their places of business in different states. Whether the goods sold move from one country to another is irrelevant.²²

Several other articles supplement this basic test of internationality. Article 1(2) requires that both parties be on notice that their businesses are in different countries. When a party has more than one place of business, article 10 provides rules of thumb for which place of business is relevant when determining whether the Convention governs the contract.

2. *What Connection Must the Sales Transaction Have to a Contracting State?*

If each party has its place of business in a Contracting State, the Convention applies by virtue of article 1(1)(a). If only one party—or if neither party—has its place of business in a Contracting State, the Convention may still be applicable if choice-of-law rules make the law of a Contracting State the applicable law. In this latter case, paragraph (1)(b) makes the Convention rather than domestic sales law the applicable law. Thus, if a French seller sells goods to an English buyer and French law is the applicable law, the relevant sales law will be the Convention.

The United States has declared that it will not be bound by article 1(1)(b), a

21. CISG art. 2(d)-(f).

22. CISG art. 1(1)(a).

reservation authorized by article 95. As a result, a court sitting in the United States is required to apply the Convention only if the parties before it have their places of business in different Contracting States.

Illustration 2. Seller has its place of business in Texas; Buyer has its place of business in Mexico. If the parties have not excluded the Convention and a dispute is brought before a Texas or Mexican court, the Convention will govern by virtue of paragraph (1)(a) of article 1. Paragraph (1)(b) and the article 95 reservation are irrelevant.

Illustration 3. Seller has its place of business in New York; Buyer has its place of business in England. (The United Kingdom is not yet a party to the Convention.) If the parties do not mention the Convention and a dispute is brought before a New York court, the court is not required to apply the Convention even if choice-of-law rules would make the law of New York applicable. This should also be the result if the dispute is brought before a court in the United Kingdom—or any other jurisdiction.

3. *What about an Enterprise with Branches in More Than One Country?*

The Convention does not define the concept of a “branch” of a business. If a business enterprise exports goods from one country to independent importers in other countries, a definition of branch is not needed. If a business enterprise establishes a subsidiary in another country, then to decide whether the Convention will apply to the enterprise’s international sales contracts requires a determination whether the enterprise is acting through its headquarters or its subsidiary. Article 10(a) provides:

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. . . .

When an enterprise has multiple branches, therefore, one must inquire which branch has “the closest relationship to the contract and its performance.” Presumably the same inquiry would be made when an enterprise acts in a foreign jurisdiction through an agent permanently resident there. The absence of a definition of “branch” creates difficulties principally when an enterprise’s presence in a foreign country is less than permanent.

Illustration 4. Seller is a New York manufacturer of electrical kitchen equipment. Buyer is a French department store. Seller has a sales agent who resides in the United Kingdom and travels throughout Europe for most of the year. While in Paris, the sales agent and Buyer sign a written agreement that Buyer will buy 1,000 electric orange juicers from Seller. The juicers were manufactured in the United States and, at the time of the sale, sit in a duty-free warehouse in the United Kingdom. If Seller performs the contract from the United States, the Convention will govern. If, on the other hand, Seller performs the contract through a “branch” in the United Kingdom, the Convention will not apply automatically. To the extent the sales agent has authority to act without specific approval from U.S. headquarters, the stronger the case that Seller is acting through a U.K. branch that is “the closest relationship to the contract and its perfor-

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

D. EXCLUDED TRANSACTIONS AND ISSUES

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

1. *Consumer Transactions*

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

Article 2

This Convention does not apply to sales:

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

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

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

2. *Products Liability Claims*

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

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

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

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

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

3. Issues of "Validity"

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

Article 4

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

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

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

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

IV. Revising Contract Forms and Practices

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

Article 6

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

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

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

25. U.C.C. § 2-718(2).

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

A. EXCLUDING (OR INCLUDING) APPLICATION OF THE CONVENTION

1. *Excluding the Convention*

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

Sample clauses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sample clauses

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

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

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

3. *Designating the Branch with the Closest Relationship*

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

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

33. See CISG art. 10(a).

Sample clause

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

4. *Derogating from the Convention*

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

B. CHOICE OF LAW, FORUM, AND LANGUAGE CLAUSES

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

1. *Choice-of-Law Clauses*

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

Sample clauses

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

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

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

2. *Choice-of-Forum Clauses*

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

34. CISG art. 39(2).

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

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

37. *Id.* at 194.

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

3. *Choice-of-Language Clauses*

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

Sample clauses

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

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

C. CONTRACT FORMATION

1. *Contract Term Requiring a Writing*

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

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

39. CISG arts. 11 & 29:

Article 11

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

Article 29

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

A Contracting State may declare that it will not be bound by articles 11 and 29.⁴⁰ The United States has not made this declaration, but several other countries have done so. Even if a country makes this declaration, its formal requirements do not necessarily prevail. One must first go through a choice-of-law analysis to determine which country's law governs this issue.

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

Sample clauses

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

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

2. *Merger Clause*

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

Sample clause

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

3. *Firm Offer*

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

40. CISG arts. 12, 96.

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

42. JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 111-12 (3d ed. 1988).

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

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

4. "Battle of the Forms"

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

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

44. See CISG art. 8.

45. U.C.C. § 2-207.

46. CISG art. 19:

Article 19

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

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

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

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

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

5. The "Fixed" Price

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

D. PERFORMANCE OBLIGATIONS

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

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

48. CISG art. 18(1).

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

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

51. CISG art. 6.

52. CISG art. 8.

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

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

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

1. *Interpreting the Parties' Agreement*

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

2. *Defining Obligations by Use of Trade Terms*

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

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

54. CISG art. 8:

Article 8

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

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

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

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

3. *Course of Dealing and Usages of Trade*

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

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

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

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

55. CISG art. 9:

Article 9

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

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

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

57. CISG art. 35:

Article 35

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

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

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

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

Sample clauses

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

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

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

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

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- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
 - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

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

Cf. U.C.C. §§ 2-313 through 2-316.

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

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

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

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

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

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

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

61. U.C.C. §§ 2-314, 2-316.

62. CISG art. 4(a).

63. CISG arts. 41-42:

Article 41

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

Article 42

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

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

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

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

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

64. CISG art. 42(2)(a); see also *id.* art. 9(2).

6. *Notice of Nonconformity*

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

Sample clauses

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

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

7. *Force Majeure Clause*

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

65. CISG art. 39:

Article 39

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

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

66. See CISG arts. 43 & 44:

Article 43

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

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

Article 44

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

67. CISG art. 79:

Article 79

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

the right to avoid the contract if authorized by other Convention provisions, but the other party cannot recover damages caused by the excused nonperformance.

In many industries the *force majeure* clause has become standardized and there will be little reason to change the clause. If a client or industry does not have a standard clause, the incorporation of Article 79 into the contract may be worth considering. While commentators have criticized article 79 for its wording and numerous alleged ambiguities, the text does not appear to be worse than most texts in domestic legislation construed more often by courts and arbitral tribunals than most contract clauses. Professor Farnsworth suggests, however, that a prudent drafter should add to the existing clause a statement expressly excluding article 79 of the Convention.⁶⁸

E. REMEDY TERMS

The Convention provides for a wide array of remedies for breach of contract by the other party. With the exception of its emphasis on specific performance and the reduction of price remedy,⁶⁹ the Convention's remedies will be familiar to an attorney trained in the common law: damages, specific performance, and avoidance (rescission).⁷⁰

As with other Convention provisions, the parties may agree to derogate from or vary the effect of the remedy provisions. The Convention, therefore, permits present contract terms that limit remedies to repair or replacement of nonconforming goods. The validity of these terms will be tested, however, by non-Convention legal rules.⁷¹

Among the issues that an attorney may wish to draft around are when a seller will have the right to cure, when a buyer has the right to demand specific performance, when an aggrieved party has the right to avoid the contract, and the rate of interest when a sum due is in arrears.

time of the conclusion of the contract or to have avoided or overcome it or its consequences.

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

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

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

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

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

68. Farnsworth, *supra* note 26, at 447.

69. CISG art. 50.

70. CISG arts. 25-28, 45-52, 61-65, 71-88.

71. CISG art. 4(a).

1. *Right to Cure*

A seller who makes a nonconforming tender has the right to cure the tender, even after the time for performance is past.⁷²

Sample clause

Notwithstanding article 48 of the United Nations Convention on Contracts for the International Sale of Goods, the buyer waives its right to avoid this contract until such time as the seller has had a reasonable opportunity to remedy, at its own expense, any nonconforming tender or nonconforming performance of any other obligation.

2. *Specific Performance*

Unlike the common law, which is reluctant to order a party to perform the act promised, the Convention assumes that specific performance is the primary remedy. The buyer may, for example, require the seller to perform.⁷³ Courts

72. CISG arts. 37, 48:

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 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.

73. CISG art. 46:

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.

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

Sample clause

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

3. *Interest*

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

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

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

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

75. CISG art. 78.

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

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

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

the court had discretion to determine the rate of prejudgment interest. The court then chose, without explanation, the U.S. Treasury Bill rate⁷⁹ to compensate an Italian buyer who had rejected the U.S. seller's tender of nonconforming air conditioners.⁸⁰

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

Sample clauses

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

The buyer shall pay interest at _____ % per annum on delay in paying for the goods. In no other situation will either party be liable for interest.⁸²

4. Reduction of Price

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

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

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

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

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

83. CISG art. 50:

Article 50

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

84. See CISG arts. 74-76.

Sample clause

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

V. Conclusion

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