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Peter Winship
Southern Methodist University, Dedman School of Law

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Formation of International Sales Contracts under the 1980 Vienna Convention

A diplomatic conference met in Vienna in March–April 1980 to consider a draft convention on the law governing international sales contracts. In its Final Act of April 10, 1980 the conference adopted without dissent a Convention on Contracts for the International Sale of Goods (CISG).¹ As of September 30, 1981 one state, Lesotho, had ratified the convention and twenty other states, from all sectors of the world community, had indicated their intention to do so by formally signing it.² Although the CISG will only enter into force twelve months after the tenth state ratifies the convention (CISG art. 99) this initial expression of support suggests that the CISG will come into force in the near future. Whether or not the United States

*Member, State Bar of Texas. Associate Professor of Law, Southern Methodist University; Visiting Fellow, Trinity College, Oxford. Chair, A.B.A. Section of International Law, Subcommittee on International Sales. I am indebted to John Honnold, Peter Pfund, Francis Reynolds, and Paul Rogers for direct and indirect help. I am solely responsible, however, for the following text.

¹U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980) (U.N. Doc. A/Conf.97/18), *reprinted in* 19 INT'L LEGAL MATERIALS 668–99 (1980). Subsequent citations to the convention will be given in the following form: CISG art. —. For a brief summary of the proceedings at the Vienna conference *see* U.N. CHRONICLE 52 (June 1980).

²The convention was open for signature until 30 September 1981. CISG art. 91. The twenty states that signed by this date include: Austria, Chile, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, France, German Democratic Republic, Ghana, Hungary, Italy, the Netherlands, Norway, Peoples' Republic of China, Poland, Singapore, Sweden, the United States, Venezuela, and Yugoslavia. In addition, Lesotho both signed and ratified the convention. Letter of December 1, 1981 from Peter H. Pfund, Assistant Legal Adviser for Private International Law, to the author. Although a state must follow signature with ratification before it will be bound, it has been suggested that signature imposes a moral obligation to seek ratification.

States that did not sign by September 30, 1981 are free to accede to the convention at any time.

ratifies the convention American traders and their advisers will have to study its provisions.³

The CISG is divided into four parts: a general part defining the convention's sphere of application and providing rules of construction; a second part on contract formation; a third part on the substantive rights and obligations of parties to an international sales contract; and a final part setting out rules on how states may formally adopt the convention and what reservations they may make to it. Among the reservations permitted by this last part is the right of a state to adopt either or both Parts II and III (CISG art. 92).

This essay focuses on the contract formation provisions in Part II, the text of which is set out in an Appendix. After examining the background to these CISG articles the essay illustrates the operation of Part II with answers to a series of short hypothetical questions. The concluding section evaluates these provisions in the light of domestic U.S. law and American interests. The conclusion suggested is that the United States should ratify the convention.

I. Background to the 1980 Convention

The final text of the 1980 convention represents fifty years of study. In the 1930s legal experts from western Europe met under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) to draft uniform rules for international sales contracts. Work on the formation of sales contracts began in 1934 but drafting was suspended during World War II and this aspect of the original project was not taken up again until 1956. The product of this study was submitted to a diplomatic conference convened at The Hague in 1964. The conference accepted the revised draft of this early work as a uniform law annexed to one of two international sales conventions adopted by the conference. The formation convention (ULF) requires a state ratifying it to incorporate the uniform law into its domestic law.⁴

³The United States' government signed the convention on the advice of the U.S. delegation to the Vienna conference and after close consultation with the Secretary of State's Advisory Committee on Private International Law and the American Bar Association. At its annual meeting in August, 1981 the A.B.A. House of Delegates recommended that the United States sign and ratify the convention. At the time this essay is being written the Department of State plans to forward the convention to the president to seek Senate advice and consent in early 1983.

Even if the United States does not ratify the convention it will still be of interest to U.S. traders. In exceptional circumstances the CISG may apply to contracts to which a U.S. trader is a party. See note 6 *infra*. Moreover, the text of the CISG is being used as a model for the revision of national sales laws. Nordic countries, for example, are revising their law in the light of the CISG.

⁴The text of the Uniform Law on the Formation of Contracts for the International Sale of Goods is set out in 834 U.N.T.S. 169 (1972), *reprinted in* 13 AM. J. COMP. L. 472 (1964), 3 INT'L LEGAL MATERIALS 864 (1964), 1 U.N. REGISTER OF TRADE LAW TEXTS 64 (1971). On the background of ULF see Farnsworth, *Formation of International Sales Contracts: Three Attempts at Unification*, 110 U. PA. L. REV. 305, 306-07 (1962).

Although the ULF ultimately came into force it was soon apparent that the 1964 conventions would not be widely adopted and that another attempt had to be made to prepare a more acceptable text. Only seven states (Belgium, Gambia, Italy, the Netherlands, San Marino, the United Kingdom, and West Germany) have ratified or acceded to the ULF. Commentators have been less critical of the substance of the ULF text than of its attempt to extend its application to transactions that might have no contact with a ratifying state and its failure to take into account the interests of non-European countries, which were virtually unrepresented at the 1964 conference. To remedy these shortcomings the newly established U.N. Commission on International Trade Law (UNCITRAL) appointed a Working Group in 1969 to review the 1964 conventions and to prepare new texts. The Working Group devoted two sessions to revising the ULF and in 1978 it submitted a redrafted text to the Commission. After some modifications the Commission adopted this text and integrated it with the substantive rules on contract rights and obligations. The U.N. General Assembly then convened a diplomatic conference in Vienna in 1980 to consider the UNCITRAL text. The Vienna conference accepted this UNCITRAL draft with only relatively minor modifications.⁵

II. Formation of the International Sales Contract

Part II of the CISG (Art. 14–24) sets out the rules regulating the formation of an international sales contract.⁶ The first four articles of Part II

⁵On the work of UNCITRAL and the background to the UNCITRAL draft see Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979); Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979). (These articles are part of a symposium issue of the AMERICAN JOURNAL OF COMPARATIVE LAW devoted to the work of UNCITRAL). The proceedings of the 1978 meeting of the Commission are set out in UNCITRAL, YEARBOOK: 1978 at 31–45 (1979).

A brief summary and analysis of the final text is found in Note, *International Trade: Uniform Law of Sales*, 22 HARV. INT'L L.J. 473 (1981). Professor John Honnold, who was co-chairman of the U.S. delegation in Vienna as well as Chief of the U.N. International Trade Law Branch and Secretary of UNCITRAL from 1969–1974, has prepared a detailed analysis of the CISG to be published in May 1982 by the Dutch publishers, Kluwer.

For analysis of the formation provisions see Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311 (1979); Lansing & Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N.C. J. INT'L L. & COM. REG. 63 (1980). Both articles must be read with care because the numbering of the articles was changed in the final text.

⁶Unless the parties agree to exclude or derogate from its provisions the CISG will apply to contracts between traders who have places of business in different states if these states are both parties to the 1980 convention. CISG art. 1(1)(a). The CISG is also applicable when conflict-of-law rules ("rules of private international law") lead to the law of a state that is a party to the convention. CISG art. 1(1)(b). A ratifying state may declare that it will not be bound by this latter provision. CISG art. 95. At the time it signed the convention the United States' government announced its intention to make this declaration. For a study of the convention's scope see Réczei, *Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513 (1981).

govern the offer. These articles provide for the prerequisites of an offer (Art. 14) and the withdrawal, revocation, and termination of an offer (Arts. 15-17). The following five articles set out the corresponding rules on acceptance. They provide for the form an acceptance may take (Art. 18), the effect of an acceptance that varies the terms of an offer (Art. 19), the time allowed for acceptance (Arts. 20-21), and withdrawal of an acceptance (Art. 22). Article 23 states that a contract is concluded when an acceptance becomes effective, which normally will be when a notice of acceptance reaches the offeror. A final provision, Article 24, defines when a communication "reaches" a party.

A reader trained in the common law and the Uniform Commercial Code will find some surprises in both the style and the scope of these provisions. In style the articles in Part II follow the civilian model of a comprehensive collection of brief, general rules rather than the more detailed and convoluted statements found in common law legislation.⁷ In scope Part II omits several matters the common lawyer would expect to find among formation rules. There is no statute of frauds; there is no reference to modification of a contract; and there is no requirement that there be consideration in order to have an enforceable contract. Several of these omissions are filled by provisions found elsewhere in the CISG. An article in Part I provides that an enforceable sales contract may be concluded without a writing (CISG art. 11)⁸ and a provision in Part III states that a contract may be modified by agreement of the parties in any form unless the original contract requires the modification to be in writing (CISG art. 29). The CISG, however, contains no provision for consideration. Of course this will rarely be a problem in the context of sale where exchange of goods for money is the object of the transaction.⁹

Several important limitations on application of the convention should be noted. The parties are free to exclude application of the convention or to vary the effect of any of its provisions. CISG art. 6. Moreover, not all sales transactions or potential issues will be governed by the CISG. The most important exclusions are of consumer sales (CISG art. 2(a)) and of claims for death or personal injury caused by the goods to any person (CISG art. 5).

⁷For a comment on the civilian style of the formation provisions of ULF see Farnsworth, *supra* note 4, at 310-13. Professor Farnsworth's criticism of ULF for excluding the role of national law as a gap-filler (*id.* at 311) is met by the CISG provision that gaps are to be filled by general principles of the convention and, in their absence, by the domestic law of the state whose law would apply under the rules of private international law. CISG art. 7(2).

⁸The need to provide for payment, carriage, and customs formalities will normally generate sufficient written evidence of a contract without worrying about the theoretical possibility that a contract may be proved by any means. A trader, moreover, may insist in his offer or acceptance that he will not be bound until a written document is signed. Article 29 itself provides that the concluded contract may require any modification to be in writing.

Article 96 of the CISG authorizes a ratifying state to declare that the convention's articles which dispense with the formality of a writing will not apply when a party has his place of business in that state. The U.S.S.R. and several east European states insisted on the inclusion of Article 96 because their domestic law requires contracts to be properly documented for state planning accountability. The United States does not plan to make a declaration pursuant to Article 96.

⁹For comments on the CISG and consideration see Eörsi, *supra* note 5, at 316 (possible that lack of consideration is question of contractual "validity" and therefore excluded from the

Notwithstanding these differences in style and scope the CISG provisions constitute a comprehensive codification which provides many of the same answers found in the common law and the Uniform Commercial Code.¹⁰ This is illustrated by the answers set out below to questions arising in the following hypothetical case. Seller, a manufacturer of equipment, has his place of business in France. Buyer, an equipment dealer, has his place of business in New York. In the following questions Buyer (the offeror) seeks to enter into a contract with Seller (the offeree) for the purchase of equipment. Assume that the CISG is in force and that both France and the United States have ratified the 1980 convention.

Question 1—On March 1 Buyer mails a letter to Seller enclosing a purchase order form for specified equipment manufactured by Seller. The letter makes specific reference to the price listed in Seller's catalog. Is Buyer's communication an "offer?"

Buyer's communication would constitute an offer under both the CISG and domestic U.S. law. The letter and form are addressed to a specific person, are sufficiently definite, and presumably indicate Buyer's intention to be bound if Seller accepts the order (CISG art. 14(1)). They are sufficiently definite because they specify the goods, the quantity, and the price (*Id.*). The letter and form would also be an offer at common law. Buyer has manifested his willingness to enter into a contract with Seller and the terms are sufficiently certain because they provide a basis for determining the existence of a breach and for giving an appropriate remedy (Rest. 2d §§ 24, 29, 33; *cf.* U.C.C. § 2-204).

If Buyer had not made a specific reference to the price in Seller's catalog he could have problems under the CISG in this type of situation where an order is made with reference to a catalog. The CISG requires a proposal expressly or implicitly to fix or make provision for determining the price before it will be deemed an offer (CISG art. 14(1)). It is conceivable that Buyer might not state the price or make a specific reference to the catalog in the belief that this reference would be understood by Seller. If there have been prior dealings between Buyer and Seller conducted in this way or if it is a recognized custom in the trade that the price is deemed to be the price

convention by CISG art. 4(a)); Lansing & Hauserman, *supra* note 5, at 78-79 (not clear consideration is an issue under the convention). See also Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary*, 11 REV. GH. L. 50, 59 (1979) (not often a problem in sales contracts, which "present clearest paradigm of mutuality and exchange").

¹⁰For the purposes of this essay the common law is assumed to be stated accurately in the RESTATEMENT (SECOND) OF CONTRACTS (1981). Subsequent citations to the Restatement and the Uniform Commercial Code will be given in the following form: Rest. 2d § —; U.C.C. § —. For a discussion of the Restatement provisions by the Reporter see Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964).

For comparative surveys of formation provisions see R. Schlesinger, *Formation of Contracts, A Study of the Common Core of Legal Systems* (1968); Cigoj, *International Sales: Formation of Contracts*, 23 NETH. INT'L L. REV. 257 (1976).

set out in a catalog¹¹ then Buyer's proposal "implicitly" fixes or makes provision for determining the price. If, however, there is no relevant course of dealing and no usage of trade then Buyer's proposal will not be characterized as an offer because the language of the CISG suggests that the terms listed (the goods, quantity, price) are necessary in order to satisfy the requirements of definiteness.¹² As a result, if Seller delivers the equipment to Buyer in response to Buyer's open-price proposal any subsequent dispute between the parties will be governed by non-CISG legal rules (*e.g.*, the domestic law of quasicontract) because there has not been a completed contract.¹³ In this situation the CISG differs from the common law and the Uniform Commercial Code, which are more receptive to the open-price contract.¹⁴

It is possible, but unlikely, that Seller's catalog will be considered an offer under the CISG and the common law. Buyer's communication would then be examined to see if it is an acceptance rather than an offer. Unless Seller "clearly" indicates otherwise, however, a catalog circulated to the public at large will be construed as only an invitation to members of the public to make an offer (CISG art. 14(2); Rest. 2d § 29). On the other hand, catalogs sent to specific dealers on a mailing list may be construed as making an offer to each dealer. If the catalog is deemed to be an offer there would usually be no difficulty about the price term because it would be listed in the catalog. The catalog itself, of course, may include language which will dispose of this problem. It might, for example, disclaim making an offer or it might make the stated price in the catalog subject to subsequent unilateral changes in price.

¹¹CISG art. 9 states:

(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.

The Vienna conference adopted the U.S. proposal to add the phrase "or its formation" to paragraph (2) to make clear that trade usages applied to Part II.

¹²*But see* Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, [1981] J. Bus. L. 346, 351 ("It is not clear whether this [second sentence in art. 14(1)] is merely a statement of sufficient conditions of a sufficiently definite proposal or a statement of necessary conditions.")

¹³One could argue that Seller's delivery is itself an offer (the implied price being that charged by Seller at the time of delivery) which is accepted by Buyer taking delivery of the goods. A court which does not find Buyer's proposal an offer, however, is unlikely to infer a price when Seller makes no reference to a price at the time of delivery.

¹⁴The number of situations where the CISG will have an effect are relatively few. In addition to the situation illustrated by the hypothetical problem discussed in the text, the debates within UNCITRAL and at the Vienna conference mentioned commodity transactions and orders of spare parts. Trade usage or course of dealing, however, may supply the price term in these situations. See note 11 *supra*.

Question 2—On March 2 Buyer sends a telegram countermanding the letter of March 1. Assuming Buyer's earlier proposal was not an irrevocable offer, is Buyer's action effective?

Under the CISG, if Buyer's telegram reaches Seller before or at the same time the letter of March 1 reaches him Buyer has "withdrawn" the offer and Seller cannot accept it (CISG art. 15(2)). If the telegram reaches Seller after the letter it will "revoke" the offer if Seller has not dispatched an acceptance or performed an act which is deemed an acceptance (CISG arts. 16(1) and 18(3)). The telegram and letter will "reach" Seller when it is delivered to him personally, or to his place of business or mailing address (CISG art. 24).

Although the common law uses the term "revocation" to cover both "withdrawal" and "revocation" it answers question 2 in the same way. Seller's unexercised power to accept terminates when Seller receives Buyer's telegram (Rest. 2d §§ 36(1)(c), 42, 68). If Seller has already exercised this power by sending a notice of acceptance or by otherwise accepting the offer then the telegram will arrive too late and will not revoke the offer. Seller will receive Buyer's telegram when he obtains possession of it personally or by an agent, or when it is "deposited in some place which he has authorized as the place for this or similar communications to be deposited for him" (Rest. 2d § 68; cf. U.C.C. § 1-201(26), (27)).

Question 3—Buyer's March 1 letter states that his offer will lapse on March 15 unless he receives Seller's notice of acceptance by that date. Is Buyer's offer "irrevocable?"

This question raises a point much debated within UNCITRAL and at the Vienna conference.¹⁵ The relevant CISG provision states that an offer is irrevocable "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable." (CISG art. 16(2)(a)). The conference adopted this text as a compromise between civil law and common law delegations. The civil lawyers, familiar with legal systems that assume an offer is irrevocable unless otherwise stated, made a concession by agreeing to adopt in the CISG the general principle of revocability (CISG art. 16(1)).¹⁶ In turn, they urged the common lawyers to agree that where a businessman states in his offer a particular period during which the offer is open this offer should be irrevocable. The common lawyers replied that this proposal failed to distinguish between a firm offer, which cannot be revoked, and an offer which lapses at the end of the stated time but can be revoked at any time. The language adopted in the CISG is described as a compromise solution.¹⁷

¹⁵Eörsi, *supra* note 5, at 321.

¹⁶This concession had already been made at the 1964 conference at The Hague. ULF art. 5. See Lagergren, *The Uniform Law on Formation of Contracts for the International Sale of Goods*, [1966] J. Bus. L. 22, 27-29.

¹⁷Although the point was debated at the 1980 conference, the text which was ultimately incorporated in the CISG was adopted at the 1978 UNCITRAL meeting. The arguments of

Perhaps the best way to read the CISG text in the light of this drafting history is to stress the importance of the offeror's intent and how a reasonable offeree would understand the offer. To answer question 3, therefore, requires close scrutiny of the language of Buyer's communication and the context in which it is made. The question suggests that Buyer's letter uses the word *lapse*, which suggests that Buyer understands the common law distinction and therefore did not intend to make an irrevocable offer. When interpreting Buyer's statement, however, we must consider not only what Buyer intended but also what Seller knew or should have known about Buyer's intent (CISG art. 8).¹⁸ Course of dealing and usage of trade will, therefore, be relevant (CISG art. 9).¹⁹ If the offeree-Seller reasonably

the different view points are summarized as follows in the summary of the UNCITRAL deliberations:

135. In support of this proposal [the compromise text ultimately adopted], it was stated that the principal test to determine that an offer could not be revoked was whether the offer indicated that it was irrevocable. Whether the offer was irrevocable could be determined by the fact that it stated a fixed time for acceptance or otherwise. However, the mere fact of stating a time for acceptance would not automatically lead to the result that the offer was irrevocable if, under the circumstances of the case, such a result was not intended. In particular, it was said, where a merchant from one common law country made an offer to a merchant from another common law country, the fixing of a time for acceptance without more would not indicate that the offer was irrevocable.
136. However, there was considerable support for the view that the interpretation placed on the words of the text by its proposers was unjustified. It was considered that this text clearly adopted the rule that, if the offer stated a fixed time for acceptance, it automatically was irrevocable.

UNCITRAL, YEARBOOK: 1978 at 41 (1979). The report of the proceedings concludes laconically: "The Commission decided to accept the wording of the compromise proposal" *Id.* at para. 137.

¹⁸CISG art. 8 states:

(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 of 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.

¹⁹CISG art. 9. See note 11 *supra*. One common law commentator has concluded:

At the Plenipotentiary Conference, some of the common law delegations suggested that in a transaction between traders from common law countries in which the offeror fixed a time for lapse of the offer and was so understood by the offeree not to have made an irrevocable offer, this would be a situation where the stating in an offer of a fixed time for its acceptance could not be interpreted by a reasonable court to mean that the offer was irrevocable. This result could easily be reached by a common law court; but it is to be doubted whether a civil law court would come to this conclusion.

Date-Bah, *supra* note 9, at 58. See also Feltham, *supra* note 12, at 352 (statement of a fixed time "would presumably not be so treated [as irrevocable] when a trader in one common law country stated a fixed time for acceptance to a trader in another common law country."). But see Eörsi, *supra* note 5, at 321 (CISG provision should be interpreted to promote uniform application; see CISG art. 7(1)).

believed the offer was irrevocable and acted in reliance on this belief (art. 16(2)(b) the offer will be deemed irrevocable (CISG art. 16(2)(b)). Presumably this might be the case in question 3 because the offeree is a Seller whose principal place of business is in a civil law jurisdiction.

Although there is a greater likelihood that an offer will be found irrevocable under the CISG than would be the case at common law (Rest. 2d §§ 24, 42) the policy of the CISG is consistent with the policy of the firm offer provision of the Uniform Commercial Code. Section 2-205 of the Code provides:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

In some respects the Code provision is more restrictive than the CISG text. The offer must be made by a merchant, in a signed writing, for a period no longer than three months. Nevertheless, under the facts outlined in question 3, it would appear that the CISG and the Code would yield the same result.

On one point tangential to question 3 the CISG and the common law may diverge. If the offer set out in the question is deemed irrevocable may it be withdrawn? The CISG explicitly authorizes withdrawal of even an irrevocable offer if the withdrawal reaches Seller before or at the same time as the offer (CISG art. 15(2)). The common law, on the other hand, has virtually no case law authority on this point presumably because there is a presumption of revocability.²⁰ What little case law there is deals with the special case of letters of credit, rather than sale of goods contracts, and decisions holding that an irrevocable letter of credit cannot be withdrawn may not be extended to sales contracts.

Question 4—On March 8 Seller mails a letter rejecting Buyer's order. Later the same day Seller changes his mind. May Seller still accept Buyer's offer?

Under the CISG Seller may change his mind but he must act promptly so that his acceptance reaches Buyer before the letter of rejection. Buyer's offer does not terminate until Seller's letter reaches him (CISG art. 17). Seller's written acceptance will become effective when it reaches Buyer and a contract will be concluded at this time (CISG arts. 18(2) and 23).²¹ If the acceptance arrives before the letter of rejection, therefore, a contract will be formed and the rejection letter will be of no effect. A prudent Seller will, of

²⁰2 R. Schlesinger, *supra* note 10, at 714-16.

²¹ Although the CISG does not address the issue of simultaneous receipt of a rejection and an acceptance presumably the acceptance received in these circumstances should be effective by analogy to other CISG provisions. See CISG art. 15(2) ("an offer . . . may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer"). See also CISG art. 22.

course, use telex or the telephone followed by a written confirmation noting that the rejection is to be considered a nullity.

A more difficult problem will occur if Seller is authorized to accept Buyer's offer by beginning performance, as he may be by the terms of Buyer's offer, course of dealing or usage of trade (CISG art. 18(3)). In this situation Seller accepts the offer the moment he performs an act, such as dispatching the equipment, which indicates his intention to take up the offer. If this performance occurs before the letter of rejection reaches Buyer the rejection will be irrelevant because it will arrive after the contract is concluded. No prudent offeree, however, will rely solely on this conceptual argument. Although the relevant CISG provision does not require the offeree-Seller to give Buyer notice that he has performed the act (CISG art. 18(3)), a judge or arbitrator may construe this provision in the light of the general good faith requirement so as to require notice under the circumstances outlined in question 4.²²

The common law agrees with the general proposition that Seller's acceptance will be effective if it overtakes the letter of rejection (Rest. 2d §§ 38, 40, 68),²³ but the common law also provides that a rejection does not terminate an irrevocable offer (Rest. 2d §§ 25, 37). An acceptance that arrives after the letter of rejection will, therefore, be effective if the offer is irrevocable. On this latter point the common law differs from the CISG because the latter provides explicitly that even an irrevocable offer is terminated when notice of rejection reaches an offeror (CISG art. 17).

Question 5—On March 8 Seller mails a letter accepting Buyer's order. Later the same day Seller changes his mind. May Seller still reject the offer?

The CISG explicitly permits Seller to withdraw an acceptance if the withdrawal reaches Buyer before or at the same time as the acceptance would have become effective (CISG art. 22). Where notices have been sent an acceptance will be effective when it reaches the offeror (CISG art. 18(2)). As in question 4, however, there will be problems if Seller has accepted by beginning performance. Conceptually the answer is clear: there is no way that a withdrawal can reach Buyer before the acceptance becomes effective and Seller's rejection will be a repudiation of a contract. On the other hand, if Seller has changed his mind and has not given notice that he has started performance a judge or arbitrator may be predisposed to find Seller's acts sufficiently ambiguous to allow a finding that Seller's acts do not indicate acceptance, especially where Buyer has not relied on the performance.

²²CISG art. 7(1) ("In the interpretation of this Convention, regard is to be had . . . to the need to promote . . . the observance of good faith in international trade"). Note that good faith is relevant to interpretation of the convention; there is no general obligation that the parties carry out their obligations in good faith. Cf. U.C.C. § 1-203.

²³See also RESTATEMENT 2d § 40, Comment, *b*. Query regarding an acceptance which arrives simultaneously with the rejection. For similar uncertainty under the CISG see note 21 *supra*.

Under the common law the result will differ depending on whether or not the offer was revocable. If the offer was revocable Seller's acceptance was effective when mailed and Seller cannot withdraw it (Rest. 2d §§ 63(a), 66). If, on the other hand, the offer is irrevocable the acceptance is not effective until it reaches the offeror and Seller, therefore, can withdraw it by a notice which overtakes the earlier letter (Rest. 2d § 63(b)).

Question 6—On March 8 Seller begins to assemble the equipment for shipping but does not notify Buyer that he has accepted Buyer's offer. On March 15 Buyer sends a telegram countermanding his order of March 1. Assuming Buyer's original offer was revocable, is Buyer's action effective?

Under the CISG Buyer's notice of revocation will be effective if it reaches Seller before Seller has "dispatched" an acceptance or before Seller has performed an authorized act indicating acceptance (CISG arts. 16(1) and 18(3)). There is no question of the dispatch of an acceptance because under the facts set out in question 6 Seller has sent no notice at all to Buyer. Where Seller is authorized to accept by performing an act, however, the CISG makes acceptance effective on performance of the act without the need to notify the offeror. If the acceptance is effective there is a completed contract and Buyer's attempt to revoke the offer will be too late. The answer to question 6, therefore, turns on whether Seller's act of assembling the equipment for shipment is sufficient to indicate acceptance. As discussed in the answer to question 4, Seller may be authorized to accept by performing an act by virtue of Buyer's offer, course of dealing, or usage of trade. Question 6 does not give sufficient information for us to draw any conclusions on this point. Even if we assume acceptance by performance is authorized it is still not clear that the assembling of equipment will be a sufficiently clear indication of assent. The CISG refers to "the dispatch of the goods" as an example of an appropriate act but surely a less dispositive act may also indicate assent. An appropriate test in the context of question 6 might be whether an outside observer would be able to tell from Seller's act of assembling the equipment that the equipment is to be used to fill Buyer's order.

These same issues will arise under the common law and the Uniform Commercial Code. Both the common law and the Code permit an offeree to accept an offer in any manner reasonable in the circumstances, including the rendering of performance (Rest. 2d §§ 30, 32; U.C.C. § 2-206). Both laws differ from the CISG, however, in that they require Seller to ensure that Buyer learns of the performance. If Seller does not notify Buyer at common law Buyer's contractual duty is discharged, while under the Code, Buyer may treat his offer as having lapsed before acceptance (Rest. 2d § 56; U.C.C. § 2-206(2)). Under either law Buyer will be bound for a reasonable time and cannot revoke during this period. This is supplemented by the common law rule that mere preparation to perform is not an acceptance but may make the offer irrevocable as an option contract (Rest. 2d §§ 87, 52, Comment *b*).

Question 7—On March 8 Seller sends a printed form accepting Buyer's order but adding a term that purports to require Buyer to arbitrate any dispute arising out of the contract. Buyer receives this form and says nothing. Do Seller and Buyer have a contract and, if they do, does the contract include the arbitration term?

The general rule in the CISG is that if Seller's purported acceptance makes any addition or modification to Buyer's original offer the acceptance will operate as a rejection and counter-offer (CISG art. 19(1)). As an exception to this general principle the CISG incorporates into the contract immaterial alterations set out in the acceptance but the number of cases that will fall within this exception is limited by a very narrow definition of *materiality* (CISG art. 19(2), (3)). Seller's arbitration term, for example, would materially alter Buyer's offer because it relates to "the settlement of disputes." Under the facts set out in question 7, where neither Seller nor Buyer has performed, there is no contract because Buyer's original offer has been rejected, Seller's "acceptance" is a counter-offer, and Buyer's silence will not operate as an acceptance of the counter-offer (CISG art. 18(1)). If Buyer subsequently accepts Seller's delivery of the equipment arguably his act will operate as an acceptance of the Seller's counter-offer and the arbitration term will be part of the agreement.

The common law and the Uniform Commercial Code have retreated from the "mirror-image" rule. If a purported acceptance includes additional or different terms and makes the acceptance conditional on the offeror agreeing to these terms then the acceptance is a counter-offer (Rest. 2d § 59). Nothing in question 7, however, suggests that acceptance is conditional. Where the acceptance is not conditional the acceptance is effective and the additional or different terms are to be construed as proposals for modification of the contract (Rest. 2d § 59, Comment *a*). In question 7, therefore, the arbitration term would be an additional term and would only be part of the contract if Buyer accepted it. Buyer's silence is unlikely to operate as an acceptance of the arbitration term (Rest. 2d § 69). The Code differs from the common law by providing that an additional term in the acceptance becomes part of the contract between merchants unless it materially alters the offer (U.C.C. § 2-207(2)(b)). Whether or not a term providing for arbitration would be a material addition is a much-debated question in the United States but most court opinions have found it to be material.²⁴ The Code would probably answer question 7, therefore, in the same way as the common law.

Question 8—Buyer's March 1 letter states that his offer will lapse "in fifteen days." Buyer mails the letter on March 2; it reaches Seller in due course on March 5. Seller sends an acceptance by telegram on March 16. Do Seller and Buyer have a contract?

²⁴See, e.g., *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239, 24 UCC REP. 257 (1980).

We cannot give a definitive answer to this question under either the CISG or the common law. On one point the CISG is clear where the common law equivocates: under the CISG the fifteen-day period begins to run from March 1, the date shown on the letter (CISG art. 20(1)).²⁵ Both laws, however, provide that to be effective the acceptance must reach the offeror before the end of the period stipulated in the offer (CISG art. 18(2)). The difficulty in determining when the period ends lies in the contract language ("in fifteen days"). Should we count the day of dispatch? Should we read "in" to mean "before" (not counting the last day) or "not more than" (counting the last day)? If the contract clause is interpreted to mean the offer ends on March 16, Seller's acceptance telegram must reach Buyer on March 16, *i.e.* the day it is sent, unless March 16 is an official holiday or a nonbusiness day at Buyer's place of business, in which case it will be effective if it arrives the next business day (CISG art. 20(2)).

If Seller's acceptance is found to have arrived late it may still be given some effect. The CISG distinguishes between an acceptance which would have arrived late in any case and an acceptance which the accepting party could have expected to arrive on time but for some reason beyond his control it arrives late. In the former case, Buyer may choose to treat the late acceptance as an effective acceptance but if he does so he must notify Seller of his decision "without delay" (CISG art. 21(1)). In the latter case, where under normal conditions the notice of acceptance shows it would have arrived on time, the acceptance is effective unless Buyer decides not to treat it as an acceptance and so notifies Seller without delay (CISG art. 21(2)). The common law does not make this distinction. If Seller's acceptance arrives after the Buyer's offer has lapsed it will be treated as a counter-offer which must be accepted by Buyer before there is a contract (Rest. 2d § 70). Buyer's silence will normally not operate as an acceptance (Rest. 2d § 69). Since Seller's acceptance may be effective as an acceptance despite variations in the terms of the offer (U.C.C. § 2-207(1), (2)) it is no doubt appropriate to give Buyer, as the original offeror, greater protection than under the CISG.

Although not directly relevant to the answer to question 8, which assumes that Buyer's offer arrived in due course, the way the CISG and the common law deal with the delayed offer provides an interesting contrast with the delayed acceptance. The CISG does not deal specifically with the problem of delay in transmission of offers, although there are such provisions for acceptances (CISG art. 21(2)) and for notices sent in accordance with provisions in Part III (CISG art. 27). These latter provisions protect the party transmitting the delayed notice by giving at least some effect to the notice. By analogy we might protect the offeror by *not* giving effect to the offer if it arrives later than the date the offeror would expect the offer by its terms to lapse. An exception might be made if the offeree reasonably

²⁵ Cf. 2 R. Schlesinger, *supra* note 10, at 1499-1500. See Rest. 2d § 41(1).

relies on the assumption that the offer is effective (*cf.* CISG art. 16(2)(b)). In effect, this is the solution adopted by the common law (Rest. 2d § 49).

III. Conclusion: The CISG and American Interests

A quick review of the preceding discussion will show the extent to which the CISG represents a compromise between civil law and common law concepts. The CISG rejects, for example, the civil law presumption that offers are irrevocable in favor of the common law presumption of revocability, but the CISG also includes a "firm offer" exception similar to that found in the Uniform Commercial Code (U.C.C. § 2-205). Although an acceptance will not be effective until it reaches the offeror (thus rejecting the common law "mailbox rule") the CISG does provide for the most important effect of the common law rule: an offeror may not revoke an offer once an acceptance is dispatched (CISG arts. 16(1), 18(2)).

The result of this conceptual amalgam is that not all cases will be resolved in the same way under the CISG and U.S. law.²⁶ The probable effect of the convention will be to enforce somewhat fewer "agreements" than would be enforced under domestic law. The CISG, for example, emphasizes the need for definiteness in an offer which means that an "open price" offer will not be effective (CISG art. 14; *cf.* U.C.C. § 2-305). Where exchanged forms do not match, application of the CISG will lead to fewer enforceable contracts because it requires the terms of an acceptance to conform to those of the offer except in narrowly defined cases where alterations are not material (CISG art. 19; *cf.* U.C.C. § 2-207).

Notwithstanding these differences the formation provisions of the CISG are compatible with American interests. As the answers to the questions set out above illustrate, the CISG and U.S. law resolve many problems in the same way and the relatively few differences will not be significant in practice. Although the CISG does not recognize an "open price" offer, for example, course of dealing and usage of trade will frequently supply the necessary detail. Moreover, to the extent that the CISG enforces fewer "agreements" this may be desirable where parties deal with each other at a distance and across national boundaries because it will force parties to produce more evidence of a concluded agreement. Finally, it should be noted that the CISG formation provisions are an improvement on the existing state of affairs. Conflict-of-law problems are particularly difficult with respect to formation issues: the parties cannot choose applicable law because the very existence of the parties' agreement is the question being asked.²⁷ At present a U.S. trader involved in a dispute about contract for-

²⁶In some respects the traditional common law rules on formation are closer in spirit to the CISG than the Uniform Commercial Code. Common law rules, such as the mirror-image rule for offer and acceptance, reflect a greater emphasis on conceptualism which results in fewer enforceable contracts.

²⁷*See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 200 (1971). *See also* 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 520-28 (2d ed. U. Drobnig 1960).

mation faces the costs of researching and proving foreign law in domestic or foreign courts. The CISG, which is available in an official English text and which no doubt will be heavily annotated, provides a single acceptable text that over time should significantly reduce these costs.

Studies of the CISG as a whole have also concluded that the 1980 convention is compatible with American interests. The U.S. delegation to the Vienna conference, the Secretary of State's Advisory Committee on Private International Law, and the American Bar Association have all endorsed the CISG and have recommended that the United States' government ratify the convention. The report prepared by the Section of International Law for the A.B.A. House of Delegates states:

The U.N. Convention on Contracts for the International Sale of Goods was prepared over many years with considerable care, drawing on the technical advice of experts from all parts of the world. The United States participated extensively and effectively in the drafting process. Although on a number of points differing national law solutions are replaced with compromise provisions, many of the CISG provisions are similar in approach and content to the Uniform Commercial Code. The major objections to the 1964 Hague conventions made by the United States have been resolved by the 1980 CISG text. The Convention will promote U.S. business interests and the United States will gain political goodwill by prompt signature and ratification of the Convention.²⁸

Academic analysts have come to similar conclusions.²⁹ This essay, which is more modest in scope than these other studies, suggests merely that there is no reason for the United States not to adopt Part II when the United States ratifies the 1980 Vienna convention.

²⁸A.B.A. Section of International Law, Report to the House of Delegates 13-14 (April 1981).

²⁹See Lansing & Hauserman, *supra* note 5, at 80 ("In the final analysis, the Convention is not likely to present complex legal adjustments for American attorneys schooled in the Uniform Commercial Code. Indeed, many attorneys will be pleasantly surprised by the relative ease with which transition between legal schools of thought can be accomplished."); Comment, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?* 2 NW. J. INT'L L. & BUS. 129, 177-78 ("It provides solutions to many of the concerns that merchants and lawyers feel pervade the international sale of goods. A unique opportunity to unify an area of law which continues to present obstacles to international commerce is at hand. In light of the substantial advantages provided by this Convention, United States ratification should be given the most serious consideration.")

Appendix

Part II

Formation of the Contract

Article 14

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

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

Article 15

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

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

Article 16

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

(2) However, an offer cannot be revoked;

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

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

Article 17

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

Article 18

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

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

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

Article 19

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