

# Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code

## I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup> is an international analog to Article Two of the Uniform Commercial Code,<sup>2</sup> which governs domestic sales of goods.<sup>3</sup> The United States now has ratification of the Convention under consideration.<sup>4</sup> If the Convention is ratified, it will displace the Code in some international sales of goods.<sup>5</sup> Because American traders may be subject to the Convention even if it is not ratified by the United States,<sup>6</sup> counsel must become acquainted with both its role in international transactions and its substantive provisions.

One of the greatest impediments to development of international trade is the plethora of national laws; international sales contracts are governed by national laws so diverse that contract obliga-

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I (1980) [hereinafter cited as CISG], *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, Official Records at 178, U.N. Doc. A/CONF.97/19 (1981) [hereinafter cited as Official Records], and in 19 INT'L LEGAL MATERIALS 671 (1980).

Throughout the text, the United Nations Convention on Contracts for the International Sale of Goods will be referred to as the "Convention." The Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, U.N. Doc. A/CONF.97 (1979) [hereinafter cited as Commentary], *reprinted in* Official Records, *supra*, at 14, will be referred to as the "Commentary." The 1978 version of the Uniform Commercial Code will be referred to as the "Code." The Restatement of Contracts, Second will be termed the "Restatement."

The Convention is organized into four "Parts," and further divided into "articles." Subdivisions of articles will be referred to as "paragraphs." The major divisions of the Code are called "Articles," which are divided into hyphenated "sections." The Restatement is arranged by "sections" without hyphens. This terminology will be used uniformly.

2. U.C.C. Art. 2 (1978).

3. U.C.C. §§ 2-102, 1-105(1) comment 2.

4. The United States signed the Convention on August 31, 1981, as provided under article 91. On September 21, 1983, President Reagan submitted the Convention to the Senate with his recommendation that it give its advice and consent to ratification. Message from the President of the United States Transmitting the Convention on Contracts for the International Sale of Goods, Treaty Doc. No. 98-9, 98th Cong., 1st Sess. (Sept. 21, 1983), *reprinted in* 19 WEEKLY COMP. PRES. DOC. 1290, 1290 (Sept. 26, 1983) [hereinafter cited as Presidential Message, with page numbers referring to WEEKLY COMP. PRES. DOC.].

5. See, e.g., Dore, *Choice of Law under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 538-39 (1983).

6. See *id.* at 536-38. See *infra* text accompanying note 65.

tions can be uncertain.<sup>7</sup> International sales are now governed by the law of the state that has the most significant contact with a transaction, which is usually the place where contract formation occurred.<sup>8</sup> Domestic conflict of laws rules sometimes fail to clearly indicate which body of national law will be applied, and the conflict rules of different states sometimes select different laws under identical circumstances.<sup>9</sup> Diversity of national laws combined with conflict of laws uncertainties create an opportunity to shop for the most advantageous forum.<sup>10</sup> One solution to these problems lies in a uniform sales law that transcends domestic law; it must be applicable without regard to domestic conflict rules and it must be comprehensive enough to replace diverse domestic laws with a single set of rules.<sup>11</sup>

The Convention aspires to the role of a transcendent uniform law. In order to lend uniformity to international sales law, the Convention must reduce the necessity of resorting to domestic conflict rules to determine applicable law and it must reduce forum shopping.<sup>12</sup> The second section of this Comment is a brief history of the effort to unify international sales law. The third section is concerned with uniformity. The applicability of the Convention with regard to both forum shopping and reliance on domestic conflict rules will be discussed. Ratification procedures are then considered in light of their direct effect on uniformity. The fourth section compares major provisions of the Convention with domestic American law of contract formation. This section catalogs similarities and differences of the Code and Convention so that demands of the Convention can be anticipated.

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7. Matteucci, *Unification of Conflicts Rules in Relation to International Unification of Private Law*, in *THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 150, 151 (1949) ("The two typical disadvantages arising from diversity of laws are: (1) the difficulty of identifying the law to be applied to the case; (2) once such law is identified, the difficulty of knowing and of interpreting its provisions.").

8. See G. DELAUME, *TRANSNATIONAL CONTRACTS, APPLICABLE LAW AND SETTLEMENT OF DISPUTES (A STUDY IN CONFLICT AVOIDANCE)* § 2.02 (booklet 2.1, Nov. 1982).

9. See *id.* at § 2.02; Rabel, *International Sales Law*, in *THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 34 (1949).

10. See *infra* text accompanying notes 58-60 and 64-65.

11. Cf. Matteucci, *supra* note 7, at 152-54 (the problems involved in researching and interpreting foreign law are discussed in the course of asserting that unification efforts must be directed to both conflicts law and substantive law).

12. The three major purposes of the Convention are: (1) to reduce forum shopping; (2) to reduce the necessity of resorting to rules of private international law; and (3) to provide a modern law appropriate for international sales of goods. Commentary, art. 1, note 4.

The value of the Commentary is discussed in Winship, *A Note on the Commentary of the 1980 Vienna Convention*, 18 *INT'L LAW* 37, 38 (1984) ("[A]lthough the Secretariat's Commentary is not an official document and has not been updated, it remains an important source of background information about the policies behind specific provisions of the Vienna convention.").

## II. Previous Efforts to Unify International Sales Law

Efforts to draft a generally acceptable uniform law on international sales have been underway for over fifty years. Beginning in April of 1930, the International Institute for the Unification of Private Law (UNIDROIT) undertook the project of drafting a uniform law on international sales of goods.<sup>13</sup> Major events in subsequent drafting include the Diplomatic Conference called by the Netherlands in 1950, the 1964 Hague Conference, the 1978 convention held by the United Nations Commission on International Trade (UNCITRAL), and the 1980 convention in Vienna.<sup>14</sup>

The project began when Mussolini offered the League of Nations backing for an institution, situated in Rome, that would work on the unification of law.<sup>15</sup> In 1930, UNIDROIT (informally known as the Rome Institute) appointed a committee to draft a uniform law on international sales of goods (ULIS).<sup>16</sup> The committee was composed of experts from England, France, Germany, and Sweden.<sup>17</sup> Two drafts were prepared and distributed to governments for comments through the League of Nations, the first in 1935 and the revised draft in 1939.<sup>18</sup> Work on the project was stopped in 1939 by the Second World War.<sup>19</sup>

UNIDROIT resumed the project in 1951 at a diplomatic conference called by the Netherlands at the Hague.<sup>20</sup> Attending the Conference on the Uniform Sales Law were representatives of twenty-one nations, the United Nations, UNIDROIT, the International Chamber of Commerce, and observers from five nations, including the United States.<sup>21</sup> The Conference accepted the 1939 UNIDROIT draft as the basis for future work, and appointed the Special Committee to revise the draft on the basis of suggestions made at the Conference.<sup>22</sup> The Special Committee produced two revised drafts, the first in 1956 and the final draft in 1963.<sup>23</sup> During this period, UNIDROIT prepared a Uniform Law on the Formation

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13. Historical Introduction to the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat ¶ 2, U.N. Doc. A/CONF.97 (1979) [hereinafter cited as Historical Introduction], reprinted in Official Records, *supra* note 1, at 3-4.

14. See generally Historical Introduction, *supra* note 13.

15. Nadelmann, *The United States and Plans for a Uniform (World) Law on International Sales of Goods*, 112 U. PA. L. REV. 697, 697 (1964).

16. *Id.* at 697.

17. *Id.* at 697. Western European nations remained the dominant influence in the unification of international sales law through the 1964 Hague Conferences. See *infra* text accompanying notes 37-39.

18. Historical Introduction, *supra* note 13, at ¶ 2.

19. *Id.* at ¶ 2.

20. Nadelmann, *supra* note 15, at 697-98.

21. *Id.* at 698.

22. *Id.* at 698.

23. Historical Introduction, *supra* note 13, at ¶ 4.

of Contracts for the International Sale of Goods (ULF).<sup>24</sup> Both the ULF and the 1963 draft of ULIS were submitted to the 1964 Hague Conference.<sup>25</sup>

The 1964 Hague Conference marked the first round of American participation in drafting the uniform sales law.<sup>26</sup> Before departing, the American Delegation was instructed to limit the number of its proposals (especially if both documents were generally acceptable to the other delegations) in order to avoid being offensive.<sup>27</sup> They were also instructed to make no commitment to United States ratification even if it appeared that the Conference would produce an acceptable draft.<sup>28</sup> The three week conference was too short to correct all the flaws in ULIS and the ULF, and it did not accomplish all that the Americans had hoped for.<sup>29</sup> The American Delegation signed both Conventions,<sup>30</sup> but did not recommend ratification by the United States Government.<sup>31</sup>

The 1964 Conference adopted the two uniform laws, ULIS and the ULF, as well as the Convention relating to a Uniform Law on the International Sale of Goods (1964 Hague Sales Convention)<sup>32</sup> and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964 Hague Formation Convention).<sup>33</sup> The two 1964 Hague Conventions were opened

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24. *Id.* at ¶ 5.

25. *Id.* at ¶ 5.

26. See generally Nadelmann, *The United States Joins the Hague Conference on Private International Law, A History with Comments*, 30 LAW & CONTEMP. PROBS. 291, 304-08 (1965) (summarizing the events leading up to the passage of domestic legislation that authorized the President to send an American delegation to participate in the 1964 Hague Conference).

27. REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA TO THE DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, THE HAGUE, APR. 2-25, 1964, reprinted in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK AND PROCEEDINGS 237, 239 (1964) [hereinafter cited as AMERICAN DELEGATION REPORT, with page numbers referring to NATIONAL CONFERENCE HANDBOOK].

28. *Id.* at 239.

29. Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326, 328-32 (1965) (the hectic pace of the 1964 Hague Convention is recounted by a member of the American Delegation). The American Delegation found five weaknesses in ULIS. These were: (1) the draft was designed to address external trade between nations with a common boundary; (2) insufficient attention had been given to international trade problems involving overseas shipments; (3) the rights and obligations of sellers and buyers were not well balanced in light of the practical realities of trade practice; (4) the Uniform Law would not be understood by individuals in the commercial field, and (5) application of the Uniform Law would have an overly broad scope. AMERICAN DELEGATION REPORT, *supra* note 27, at 241.

30. Honnold, *supra* note 29, at 331 n.18 ("The United States and nearly all of the other governments in attendance at the Conference signed [the] Final Act, which comprised a detailed recital of the events of the Conference; this signature, of course, does not involve any obligation to ratify the conventions prepared at the Conference.").

31. AMERICAN DELEGATION REPORT, *supra* note 27, at 246-48.

32. The 1964 Hague Sales Convention and the text of ULIS may be found at 834 U.N.T.S. 107-68 (1972).

33. Historical Introduction, *supra* note 13, at ¶ 6. The 1964 Hague Formation Conven-

for signature on July 1, 1964.<sup>34</sup> The 1964 Hague Sales Convention became effective on August 18, 1972, and has been ratified by eight nations.<sup>35</sup> The 1964 Hague Formation Convention took effect on August 23, 1972, and has been ratified by seven nations.<sup>36</sup>

Western European domination of the 1964 Conventions is reflected in the fact that ULIS and the ULF are essentially products of civil law.<sup>37</sup> As a consequence of this domination, ULIS and the ULF had a narrow following.<sup>38</sup> After soliciting comments from Member States of the United Nations, UNCITRAL decided in 1969 to revise ULIS and the ULF in order to make them more widely acceptable.<sup>39</sup> The Commission adopted a draft Convention on Sales at its tenth session in 1977.<sup>40</sup> A draft convention on formation was adopted at the eleventh session in 1978.<sup>41</sup> At the 1978 session, the two draft Conventions were merged to create the draft Convention on Contracts for the International Sale of Goods.<sup>42</sup> This draft Convention was adopted, with minor modifications, at a Conference of Plenipotentiaries in April of 1980.<sup>43</sup>

### III. Applicability of the Convention—The Goal of Uniformity

#### A. Sphere of Applicability

Chapter I of the Convention determines its sphere of applicability. The key provision, paragraph (1) of article (1), indicates that the Convention applies to only international sales of goods. International sales are defined as those between parties whose places of business are in different states.<sup>44</sup> Transactions between parties within the

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tion and the text of the ULF may be found at 834 U.N.T.S. 196-217 (1972).

34. Historical Introduction, *supra* note 13, at ¶ 6.

35. *Id.* at ¶ 7. Nations ratifying or acceding to the 1964 Hague Sales Convention include: Belgium, the Gambia, Federal Republic of Germany, Israel, the Netherlands (for the Kingdom in Europe), San Marino, and the United Kingdom. *Id.* at ¶ 7.

36. *Id.* at ¶ 7. Nations ratifying or acceding to the 1964 Hague Formation Convention include all those adopting the Sales Convention except Israel. *Id.* at ¶ 7. See *supra* note 35.

37. See Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 225 (1979).

38. *Id.* at 225.

39. Historical Introduction, *supra* note 13, at ¶¶ 8-10.

40. *Id.* at ¶ 11.

41. *Id.* at ¶ 11.

42. *Id.* at ¶ 11.

43. Dore, *supra* note 5, at 522-23.

44. CISG art. 1(1). Article 10 contains standards for determining the place of business of a party. Article 10 provides that,

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

same state are governed by the domestic law of that state.<sup>45</sup> The Convention will be applied to an international sale of goods if either: (a) the place of business of each party is in a contracting state,<sup>46</sup> or (b) the conflict of laws rule of the forum state calls for application of the law of a contracting state.<sup>47</sup>

The remaining articles in Chapter I narrow the sphere in which the Convention applies. Article 2 prohibits application of the Convention to several types of transactions,<sup>48</sup> the most widespread being sales of goods bought for personal, family, or household use.<sup>49</sup> Application to hybrid contracts is circumscribed by article 3, which excludes contracts if the preponderant part of the seller's obligations is to supply services.<sup>50</sup> The Convention is not concerned with either the validity of a contract or passage of title to the goods sold.<sup>51</sup> The Convention does not determine the liability of the seller for death or personal injury caused by the goods.<sup>52</sup> The Convention may be entirely excluded from application by choosing a different law to govern a contract.<sup>53</sup> Provisions of the Convention may be varied by agree-

*Id.* art. 10.

45. Commentary, art. 1, note 2.

46. The term "Contracting State" is used throughout the Convention to denote a nation that has ratified the Convention.

47. CISG art. 1.

48. Article 2 states,

This Convention does not apply to sales:

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

CISG art. 2.

49. Consumer sales are excluded from the Convention in order to avoid impairing domestic consumer protection laws. Commentary, art. 2, note 3.

50. Article 3 provides,

(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.

CISG art. 3.

The standards in article 3 of the Convention are more definite than the standard in Article 2 of the Code. U.C.C. § 2-102 states that "this Article applies to transactions in goods . . . ." Judicial decisions on the applicability of Article 2 to hybrid sales has produced conflicting results. Del Duca, *Constitutionality of Statutory Exclusion of Implied Warranties Challenged—Oscillation Between Expanded and Contractual Application of U.C.C. Article 2*, 8 U.C.C. L.J. 5 (1975). The express standards of article 3 should avoid this confusion.

51. CISG art. 4.

52. CISG art. 5.

53. CISG art. 6. By choosing the law of the contract at the time of formation, the parties may avoid the uncertainties in the applicability of the Convention. See *infra* text accompanying notes 57-59 and 65-66.

ment;<sup>54</sup> the Convention supplies presumptions that fill only open terms of a contract. Issues encompassed by these exceptions will be decided by domestic law rather than by the Convention.

It is generally agreed that the uniform law should be applied when all parties are from ratifying nations, and article 1(1)(a) is designed to invoke the Convention in this situation. Under paragraph (1)(a), the Convention automatically<sup>55</sup> governs all international sales of goods between parties from contracting states when the forum of litigation is itself a contracting state.<sup>56</sup> To the extent that the Convention applies without reference to other conditions, reliance on domestic conflict rules is eliminated.

Application of the Convention becomes contingent on domestic conflict rules when the forum is not a contracting state. If the conflict rule of the forum selects the law of either the forum or another state that has not adopted the Convention, then the Convention is not applied.<sup>57</sup> Application under article 1(1)(a) must be contingent on domestic conflict rules because a court cannot be precluded from applying its own conflict rules where the Convention has not been adopted.<sup>58</sup> In a transaction between parties from contracting states, application of the Convention can be manipulated by bringing suit in a forum with the desired conflict rule. Forum shopping might be curbed by the duty of good faith found in article 7(1), which applies throughout the Convention.<sup>59</sup>

The opportunity for forum shopping under paragraph (1)(a) is illustrated by the effect of an acceptance that is lost in the mail.<sup>60</sup>

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54. CISG art. 6. It is not clear whether implied agreements will be recognized under article 6. Language providing that "such agreements may be express or implied" appeared in article 3 of ULIS, but was not incorporated into article 6 of the Convention. Commentators Dore and DeFranco have used this fact to support their position that an implied agreement to exclude or vary the Convention will not be enforced. Dore & DeFrance, *A Comparison of the NonSubstantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 53 n.19. Professor Honnold has taken the position that implied agreements are permissible because UNCITRAL refused to provide that the exclusion must be express. J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 76 (1982). At the 1980 convention in Vienna, the United Kingdom offered an amendment that would have allowed both express and implied agreements to vary or exclude the Convention. Pakistan offered an amendment that would have inserted the word "expressly" after the words "the parties may." Because both proposals were rejected, the legislative history of the 1980 convention is inconclusive. See Report of the First Committee, Art. 5, U.N. Doc. A/CONF.97/11 (1980), reprinted in Official Records, *supra* note 1, at 82, 85-86.

55. No specific agreement is required to make the Convention applicable once the standards of article 1 have been met. An agreement is required only to exclude the Convention through article 6. Dore, *supra* note 5, at 531-32.

56. Reczei, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513, 518 (1981); Dore, *supra* note 5, at 531.

57. Reczei, *supra* note 56, at 518. See Dore, *supra* note 5, at 531.

58. Reczei, *supra* note 56, at 518.

59. The duty of good faith as a general principle in both the CISG and the UCC is discussed in Dore & DeFranco, *supra* note 54, at 60-63.

60. See *infra* text accompanying notes 185-88.

Hypothetical parties *A* and *B*, who are from different contracting states, are mutually interested in executing a sale of goods. Seller *A* sends Buyer *B* an offer, and *B* responds by mailing an acceptance. The acceptance is lost in the mail. The seller is reluctant to tender the goods because prices have risen sharply. If the buyer brings suit in a contracting state, the Convention will impose its rule of dispatch and the frustrated letter of acceptance will not be effective.<sup>61</sup> Acceptance may be effective under the mail box rule of the common law, which makes acceptance effective upon dispatch.<sup>62</sup> The buyer can avoid the unfavorable result of the Convention by locating a noncontracting common law state with jurisdiction over the seller. A state will have jurisdiction over the seller if he has assets within its territory and the presence of assets is a basis for assuming jurisdiction under domestic law.<sup>63</sup> If the good faith provision of article 7(1) does not prevent *B* from bringing suit in a noncontracting state, then *B* can manipulate the outcome by forum shopping.

The possibility of forum shopping under paragraph (1)(a) is magnified in paragraph (1)(b), which does not require that the parties belong to contracting states. The sole condition in applying the Convention to an international sale of goods under paragraph (1)(b) is that the conflict rule of the forum directs one to the law of a contracting state. Through the conflict rule of the forum, the Convention can become the governing law even though neither party is from a contracting state and the forum is not a contracting state.<sup>64</sup> The Convention may unexpectedly become applicable if, through forum shopping, one party is able to obtain jurisdiction in a state with an advantageous conflict rule.<sup>65</sup>

The potential for forum shopping under paragraph (1)(b) is illustrated by the treatment of an irrevocable offer.<sup>66</sup> Hypothetical Seller *A* is from the United States and Buyer *B* is from Canada. Neither state has ratified the Convention. *A* offers to sell goods to *B*

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61. CISG art. 18(2).

62. RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1979) [hereinafter cited as REST. 2d].

63. Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449, 457 (1965).

64. See Commentary, art. 1, note 7; J. HONNOLD, *supra* note 54, at § 46.

65. The American Bar Association Section of International Law and Practice has recommended that the United States ratify the Convention subject to a reservation declaring that the United States will not be bound by article 1(1)(b). Section of International Law and Practice, *American Bar Association Report to the House of Delegates* (1981), reprinted in 18 INT'L LAW. 39, 39 (1984) [hereinafter cited as *ABA Report*, with page numbers referring to 18 INT'L LAW.]. President Reagan has concurred with this recommendation in his letter of transmittal. Presidential Message, *supra* note 4, at 1290. See *infra* text accompanying notes 78-82. Commentaries expressing concern over unexpected application of the Convention through article 1(1)(b) and those indicating satisfaction with article 1(1)(b) are cited in note 82 *infra*.

66. See *infra* text accompanying notes 150-56.



and indicates that the offer will remain irrevocable for four months. Two months later there is a sharp rise in the prevailing price of the goods. When *B* accepts the offer during the fourth month, *A* refuses to tender the goods.

The duration of an irrevocable offer may be different under domestic American law than under the Convention. If *B* brings suit in the United States, his acceptance will be held ineffective because the U.C.C. places a three month limit on the duration of an irrevocable offer.<sup>67</sup> *B* can impose his acceptance on *A* and enforce the contract by bringing suit in a forum<sup>68</sup> that will apply the Convention, since the Convention does not set a maximum duration for an irrevocable offer.<sup>69</sup> The transaction will be governed by the Convention if the conflict rule of the forum imposes the law of a contracting state; under paragraph (1)(b) it does not matter that neither party is from a contracting state or that the forum is not a contracting state. This opportunity for forum shopping allows *B* to effect the outcome by invoking the Convention when it is not expected.

Application of the uniform international sales law via domestic conflict rules has long been an issue. Drafts prior to 1964 applied the uniform law only when the conflict rule of the forum selected the law of a signatory nation.<sup>70</sup> This provision was deleted at the Hague Conference of 1964 because it was considered too complex, and ULIS was applied without regard to domestic conflict rules.<sup>71</sup> At the 1980 Convention in Vienna, several delegations objected to application via conflict rules and sought deletion of article 1(1)(b).<sup>72</sup> A delegate from the Federal Republic of Germany stated that subparagraph (b) introduced an unwelcome element of complexity, and noted that similar provisions in the 1964 Sales Convention contributed to its failure to achieve widespread adoption.<sup>73</sup> He stressed that it is unusual for an international instrument to require its own application when neither party is a member of a succeeding state.<sup>74</sup> A Czechoslovakian delegate added that article 1(1)(b) would create special difficulties in nations that have domestic legislation governing international sales.<sup>75</sup>

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67. U.C.C. § 2-205 (1978).

68. A state will have jurisdiction over a party who has assets located within its boundaries if the presence of assets is a basis for assuming jurisdiction under domestic law. Nadelmann, *supra* note 63, at 457.

69. See CISG art. 16(2).

70. Reczei, *supra* note 56, at 514.

71. *Id.* at 514. See ULIS, *supra* note 32, at art. 2.

72. See Summary Records of the First Committee, First Meeting, at Art. 1, U.N. Doc. A/CONF.97/C.1/SR.1 (1980) [hereinafter cited as First Committee] reprinted in Official Records, *supra* note 1, at 236, 236-38.

73. *Id.* at ¶ 10.

74. *Id.* at ¶ 12.

75. *Id.* at ¶ 14. The special domestic legislation referred to by the Czechoslovakian

Arguments for retaining article 1(1)(b) were based on the need to promote uniformity. A Bulgarian delegate said that contracting states should regard the Convention as the law applicable to all international sales of goods rather than as a special law for sales between contracting states. Accordingly, paragraph (1)(b) is needed to apply the Convention to sales between noncontracting states.<sup>76</sup> A French delegate amplified this view by asserting that a state with a law drafted specifically for international trade has a right to apply that law rather than its less appropriate domestic legislation.<sup>77</sup> The policy of fostering uniformity through widespread application of the Convention can easily create an overly broad scope of application, which allows unexpected application and forum shopping. States must assess this balance of tensions in deciding whether to ratify the Convention subject to a reservation concerning article 1(1)(b).

Both President Reagan<sup>78</sup> and the American Bar Association Section on International Law and Practice<sup>79</sup> have recommended ratification of the Convention, but have urged the Senate to declare under article 95 that the United States will not be bound by article 1(1)(b). Making a reservation under article 95 will allow United States courts to apply domestic law if one party is not from a contracting state;<sup>80</sup> forum shoppers will not be able to invoke the Convention against a party from a state that has not ratified the Convention. This reservation will protect Americans against surprise application of the Convention in their own courts, but it will not prevent forum shopping in foreign courts where paragraph (1)(b) has been adopted. Merchants everywhere will need to be alert to the possibility of being subject to the Convention through article 1(1)(b) unless ratification is universally subject to reservation under article 95.<sup>81</sup> Scholars have disagreed on the extent to which the problem of an overly broad scope has been carried over from ULIS, but most feel that the scope remains broad enough to allow forum shopping.<sup>82</sup>

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delegate is the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, which regulates international trade between some socialist nations. The concern is that the Convention will displace the General Conditions in sales between these socialist nations. Reczei, *supra* note 56, at 520-21.

76. First Committee, *supra* note 72, at ¶ 17.

77. *Id.* at ¶ 19. The proposal to delete article 1(1)(b) was defeated by a vote of 25 to 7, with 10 abstentions. *Id.* at ¶ 29.

78. Presidential Message, *supra* note 4, at 1290.

79. *ABA Report*, *supra* note 65, at 39. Upon signing the Convention in August 1981, the United States declared its intention to file a reservation excluding article 1(1)(b) in the event of ratification. Dore & DeFranco, *supra* note 54, at 55 n.28.

80. Dore & DeFranco, *supra* note 54, at 55; Reczei, *supra* note 56, at 518.

81. See Dore & DeFranco, *supra* note 54, at 55-56.

82. The breadth of article 1(1)(b) is criticized in Reczei, *supra* note 56, at 518-19 ("Is it proper that when neither the judge nor the two litigants belong to a contracting country, the case should still be decided under a convention that their countries have never ratified?"); Dore, *supra* note 5, at 540 (expressing concern over forum shopping); Cain, *The Vienna Con-*

### B. Uniform Ratification

The Convention will become a transcendent uniform law only if it is ratified without local variations. Ratification is treated in Part IV of the Convention. In addition to outlining the procedures and conditions under which the Convention will become effective,<sup>83</sup> Part IV allows ratification to be made subject to reservations concerning selected provisions.<sup>84</sup> The opportunity for partial ratification may impede progress toward a transcendent uniform law. Reservations allow retention of domestic law when failure to reach a compromise leaves the Convention unacceptable to certain states.<sup>85</sup> It is also necessary to resort to domestic law when the Convention does not address an issue.<sup>86</sup> Complete uniformity is not necessary to produce a useful law,<sup>87</sup> but a minimum level of uniformity is required to avoid the uncertainties inherent in applying domestic law to international sales.

Article 92 permits a contracting state to declare it will not be bound by Part II or Part III of the Convention. A declaration made in regard to Part II will prevent application of the uniform rules on formation, allowing private international law to govern the transaction. Under article 94, contracting states with closely related legal rules may declare that the Convention will not apply to sales between parties from their states. Disagreement over application via

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*vention: Posing a New International Law of Sales*, 57 CONN. B.J. 327, 329 (1983) (the United States should not ratify article 1(1)(b) because it may lead to application of the Convention in some situations not contemplated by international traders); *Recent Developments, United Nations Convention on Contracts for the International Sale of Goods*, 22 HARV. INT'L L.J. 473, 478-79 (1981) (article 1(1)(b) creates an element of uncertainty in the applicability of the Convention); Note, *Contracts for the International Sale of Goods*, 69 IOWA L. REV. 209, 221-23 (1983) (article 95 does not solve the problem of uncertainty created by article 1(1)(b)).

Commentaries satisfied that the Convention has done everything possible to solve the problems in applying of ULIS include Honnold, *supra* note 37, at 228 (The 1978 Draft Convention follows a more conservative path than ULIS. The inability to escape the vagaries of conflicts rules should add impetus to measures for achieving international unification in that area.); Comment, *United Nations Commission on International Trade Law: Will a Uniform Law in International Sales Finally Emerge?*, 9 CAL. W. INT'L L.J. 157, 172 (1979) ("The Convention's revision of this ULIS abnormality is an example of the former's superiority.").

83. CISG arts. 99-101.

84. Article 98 states, "No reservations are permitted except those expressly authorized in this Convention." CISG art. 98.

85. "Reservations permitted by a convention usually reflect the quality of the work done and the degree of agreement actually reached." Nadelmann, *supra* note 63, at 455.

86. Article 7(2) provides,

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

CISG art. 7(2).

87. The UCC does not attempt to unify all areas of commercial law; section 1-103 provides that general principles of law are applicable unless displaced by particular provisions of the UCC.

domestic conflict rules led to the inclusion of article 95, which allows a contracting state to declare that it will not apply the Convention using article 1(1)(b). The fourth avenue of nonuniform ratification involves writing requirements. Article 96 allows a contracting state to override article 11 and subordinate the Convention to domestic legislation requiring contracts to be made in writing. These possibilities for partial ratification increase the need to keep abreast of diverse domestic laws and expand the opportunities for forum shopping under article 1(1)(b).

The Convention permits partial ratification in an effort to become palatable to a broad range of states. When compromises cannot be reached on specific issues, it may be wise to allow nonuniform adoption rather than permitting individual issues to foil the entire project. The consequence of partial adoption, however, is that the need to resort to domestic law will remain a source of uncertainty in the law of international sales. Scholars have expressed concern that uniformity could be lost through widespread use of articles 92, 94, 95 and 96.<sup>88</sup> If a substantial number of states ratify the Convention with reservations, additional work may be necessary to produce a widely acceptable document.

#### IV. Contract Formation under the CISG and UCC

This section compares the major provisions of both the Convention and domestic law concerning issues in contract formation. Part II of the Convention is devoted to contract formation. This topic is addressed in Article Two, Part Two of the Code. When the Code is silent or is supplemented by general principles of law, the Restatement will be used as the representative domestic common law.<sup>89</sup>

Several general provisions affecting formation should be noted before discussing the rules on formation itself. Both the Code and Convention contain a set of operating presumptions, and invite the parties to vary those presumptions by agreement.<sup>90</sup> While the Code has a special statute of frauds applicable to sales,<sup>91</sup> the Convention places no requirements on the form of a contract.<sup>92</sup> The Convention

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88. See Dore, *supra* note 5, at 536 ("In particular, the ease and frequency with which the exceptions are used by international businessmen or their states could undermine the long term effectiveness of the Convention (even assuming ratification by a substantial number of countries) by encouraging just the type of forum shopping and reliance on private international law that the Convention is designed to discourage."); Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 354 (1983) (Compromises reached by allowing a declaration "impair the unification of law; bluntly speaking, everyone may apply his own law."); Reczei, *supra* note 56, at 519 (reservations weaken the universal character of the Convention).

89. See U.C.C. § 1-103 (1978).

90. CISG art. 6; U.C.C. § 1-102(2).

91. U.C.C. § 2-201.

92. CISG art. 11.

specifically dispenses with a writing requirement in article 11, but 12 recognizes that a nation may elect to impose a writing requirement by declaration under article 96.

#### A. Offer

1. *Criteria of an Offer.*—Definiteness and intent to be bound are the two criteria of an offer under both the Code and Convention. Under article 14 of the Convention, a proposal to conclude a contract is an offer if it is sufficiently definite and indicates an intention by the offeror to be bound upon acceptance. Section 2-204(1) of the Code emphasizes the element of intent, allowing a contract to be made in any manner sufficient to show agreement. Section 2-204(3) requires a degree of definiteness that will create “a reasonably certain basis for giving an appropriate remedy.”

An offer must be directed to a specific individual or group of offerees. The rule stated in article 14(1) of the Convention applies only to proposals addressed to one or more specific persons. Article 14(2) raises a presumption that a communication not bearing a specific addressee is an invitation to make offers rather than an offer. The Convention allows one to accept an offer only if it has been addressed to him.<sup>93</sup> The Restatement allows acceptance only by a person whom the offer invites to furnish consideration.<sup>94</sup> Both rules have the effect of preventing acceptance of an offer by uninvited third parties.

Proposals that are not sent to one or more specific addressees are called “general” or “public” offers.<sup>95</sup> Two examples of general offers are an announcement addressed to the general public and a display of goods offered for sale. A general offer may create separate powers of acceptance in an unlimited number of people.<sup>96</sup>

General offers are recognized by Restatement section 29(2), which states, “An offer may create a power of acceptance in . . . anyone or everyone who makes a specified promise or renders a specified performance.” Convention article 14(2) allows for public offers even though a proposal not bearing a specific addressee is presumed to be only an invitation to make offers. A public declaration may be deemed an offer if it is clearly intended as an offer and the paragraph (1) requirements of definiteness and intent to be bound are satisfied.<sup>97</sup>

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93. Commentary, art. 12, note 2.

94. REST. 2d § 52.

95. Commentary, art. 12, note 4.

96. REST. 2d § 29 comment b.

97. CISG art. 14 (2).

Intent is one criterion of an offer. The Convention requires that both parties assent to contract obligations.<sup>98</sup> An offer must indicate an intention of the offeror to be bound in the event of acceptance.<sup>99</sup> Acceptance occurs when the offeree indicates assent to the offer.<sup>100</sup> Like the Convention, the Code focuses on the intent of the parties, allowing a contract to be made in "any manner sufficient to show agreement."<sup>101</sup> It is essential that agreement take place during contract formation.

The terms of a proposal must have some degree of definiteness if it is to be an offer.<sup>102</sup> The Convention states, "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."<sup>103</sup> These three listed terms—type of goods, quantity, and price—are a safe harbor in which all proposals containing these terms will be deemed "sufficiently definite."<sup>104</sup> Open terms may be filled by a course of conduct,<sup>105</sup> trade usage,<sup>106</sup> or various provisions of Part III of the Convention.<sup>107</sup>

The Code does not require that a standard set of terms appear in every offer. Section 2-204(3) provides that open terms will not cause a contract to fail for indefiniteness if, *inter alia*, "there is a reasonably certain basis for giving an appropriate remedy." A course of dealing or trade usage may be used to interpret, supplement, or qualify the ambiguous terms of an agreement.<sup>108</sup> The Code also installs various operating presumptions which fill completely open terms of an agreement.<sup>109</sup>

A completely open quantity term prevents contract formation under both the Code and Convention. Under the Convention, a

98. CISG arts. 14(1) (offer), 18(1) (acceptance).

99. CISG art. 14(1).

100. CISG art. 18(1).

101. U.C.C. § 2-204(1). *See, e.g.*, Kleinschmidt Division of SCM Corp. v. Futronics Corp., 41 N.Y.2d 972, 363 N.E.2d 701, 395 N.Y.S.2d 151 (1977) (failure to agree to a material term does not necessarily prevent contract formation, but when a dispute over material terms indicates that the intention to contract is not present, formation does not occur).

102. CISG art. 14(1); U.C.C. § 2-204(3).

103. CISG art. 14(1).

104. CISG art. 14(1). There is some ambiguity concerning the role of the three terms listed in article 14(1)—type of goods, quantity, and price. These terms are either a safe harbor in which all offers bearing these terms will be deemed "sufficiently definite" or a condition that all offers must satisfy in order to avoid failing for indefiniteness. If these terms are a threshold, they must always be present in an offer. If the terms create a safe harbor, an offer can be found even though one or more of these terms are missing. If the three terms are required for all offers, article 55, which fills a missing price term with the current market price, appears to serve no purpose. *See* J. HONNOLD, *supra* note 54, at § 37.

105. CISG art. 8(3).

106. *Id.*

107. *See, e.g.*, CISG arts. 33 (time of delivery), 55 (price).

108. U.C.C. §§ 2-208 (1), (2); 1-205(3), (5).

109. *E.g.*, U.C.C. § 2-305(1) (setting the price as "a reasonable price at the time of delivery") and U.C.C. § 2-309(1) (allowing a reasonable time for shipment or delivery).

quantity is sufficiently definite if it is explicitly or implicitly fixed or a method of determining quantity is adopted.<sup>110</sup> The parties have broad discretion to adopt any quantity formula upon which they can agree. The Code also affords the parties broad discretion in setting quantity. The sole substantive limitation on this discretion imposed by the Code is the requirement that there must be "a reasonably certain basis for giving an appropriate remedy."<sup>111</sup> Notwithstanding this broad discretion, there must be some indication of the quantity because neither the Code nor the Convention contains a presumption filling a completely open quantity term. Acceptance or performance may indicate the quantity if the offer does not.

The statute of frauds contained in Article Two of the Code requires written evidence of the alleged contract as a condition to submitting evidence of a claim or defense.<sup>112</sup> The quantity is the only term that must appear in the writing.<sup>113</sup> The quantity need not be stated accurately, but recovery is limited to the amount stated.<sup>114</sup> If the quantity is not stated in writing, it may be evidenced by the act of accepting and paying for the goods.<sup>115</sup> If the goods must be specially manufactured, then evidence of quantity is not required<sup>116</sup> because the difficulty of selling specialties evidences the seller's commitment to an agreement. The Convention does not require that a contract be in writing,<sup>117</sup> but allows an enacting State to impose a writing requirement if this protection is desired.<sup>118</sup>

Both the Code and Convention recognize output and requirements contracts. The broad language in article 14 of the Convention allows these contracts because it does not require that the quantity be ascertainable any time before performance.<sup>119</sup> An obligation of good faith is imposed in output and requirements contracts.<sup>120</sup> A quantity agreement calling for all outputs or requirements is understood to mean the actual amount available or required in good faith.<sup>121</sup>

Section 2-306(1) of the Code expressly authorizes output and requirements contracts and imposes an obligation of good faith and reasonableness on the parties. Even though a disproportionately large

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110. CISG art. 14(1).

111. U.C.C. § 2-204(3).

112. U.C.C. § 2-201(1).

113. U.C.C. § 2-201 comment 1.

114. *Id.*

115. U.C.C. § 2-201(3)(c).

116. U.C.C. § 2-201(3)(a).

117. CISG art. 11.

118. CISG art. 12.

119. Commentary, art. 12, note 11.

120. See CISG art. 7(1) (Interpretation of the Convention is to be done with regard to the need to promote "observance of good faith in international trade.").

121. Commentary, art. 12, note 12.

quantity is delivered or requested in good faith, it will be unenforceable if it is "unreasonably disproportionate" to estimates stated in the contract or common to experience.<sup>122</sup> An output or requirements contract meets the standard of definiteness because the quantity provision is interpreted as the actual good faith output or requirements of the particular party.<sup>123</sup>

A contract may be formed even though the proposals have been completely silent concerning price. As with quantity, the Convention allows the price to be set explicitly, implicitly, or by formula.<sup>124</sup> If there are neither explicit nor implicit provisions for determining price, then article 55 supplies an implied reference to the market price prevailing at the time the contract is concluded.

The Code allows the price term to be left open during contract formation.<sup>125</sup> A reasonable price at the time of delivery is inserted if the term is left open and the parties nonetheless intend to be bound.<sup>126</sup> Even though the price may not be presently ascertainable, there is usually a "reasonably certain basis for granting an appropriate remedy for breach," so that the contract need not fail for indefiniteness if the dominant intention of the parties is to be bound.<sup>127</sup>

2. *The Moment an Offer Takes Effect—Dispatch and Receipt Theories.*—Contract formation is affected by the choice between the dispatch and receipt theories of when a communication becomes effective. The theory chosen determines whether a contract is formed in the event an offeree's letter of acceptance is lost in the mail and fails to reach the offeror.

The common law adopts a rule of dispatch, with contract formation taking place when the offeree mails an acceptance.<sup>128</sup> The offeror bears the risk of delay or nondelivery if the offeree dispatches an acceptance by a medium explicitly or implicitly authorized by the offeror. Civil law systems generally adopt the receipt theory, delaying contract formation until the offeror receives notice of acceptance.<sup>129</sup> Inherent in the contracting process is a hiatus between the dispatch and receipt of a communication. During this hiatus, the addressee does not know that a communication has been dispatched, which is problematic because neither party can control the risk of a

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122. U.C.C. § 2-306(1).

123. U.C.C. § 2-306(1) comment 2.

124. Article 8 of the Convention provides standards for developing the implied terms of an agreement.

125. See U.C.C. § 2-204(3) comment.

126. U.C.C. § 2-305.

127. U.C.C. § 2-305(4) comment 1.

128. Eorsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 317 (1979).

129. *Id.* at 317.



frustrated transmission. Under the dispatch theory, a communication may be effective even though its transmission has been frustrated. The rule of receipt denies effect to a lost or delayed message. Despite this fundamental difference, both rules allow a party acting in good faith to labor under a disadvantage.

In most instances, the Convention embodies the civil law tradition of the receipt theory. An offer,<sup>130</sup> withdrawal of an offer,<sup>131</sup> revocation of an offer,<sup>132</sup> termination of an offer by rejection,<sup>133</sup> and a statement of acceptance<sup>134</sup> become effective only upon receipt.

Domestic common law adopts a rule of receipt concerning offers and a rule of dispatch for acceptances. Acceptance takes effect upon dispatch regardless of whether it ever reaches the offeror, so long as it is made in a manner and by a medium invited by the offer.<sup>135</sup> In contrast, a communication must be received by the offeree for it to revoke an offer; receipt of an offeror's manifestation of intent not to enter into the proposed contract terminates an offeree's power of acceptance.<sup>136</sup> Unless the offeror reserves the power to revoke the offer without notice, the offeree may rely on the original offer and will remain unaffected by any undisclosed changes of mind by the offeror.<sup>137</sup>

Acceptance may be made by performing an act in response to an offer. The Convention departs from the rule of receipt in determining when acceptance by conduct becomes effective. Article 18(3) allows action to be immediately effective as an acceptance without notice when sanctioned by a course of dealing or trade usage. Section 2-206(2) of the Code allows acceptance by an act, but requires notification of the offeror within a reasonable time. It has been suggested that courts will invoke the good faith requirement of article 7(1), and require the offeree to provide notice of acceptance within a reasonable time after accepting by performance.<sup>138</sup> If the Convention does not require notice of acceptance by action, then it will not synchronize with the Code on this point.

3. *Withdrawal of an Offer.*—An offeror may wish to withdraw an offer after it has been dispatched. If the offeree issues an acceptance after withdrawal has been dispatched, it becomes important to

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130. CISG art. 15(1).

131. CISG art. 15(2).

132. CISG art. 16(1).

133. CISG art. 17.

134. CISG art. 18(2).

135. REST. 2d § 63.

136. REST. 2d § 42.

137. REST. 2d § 42 comment b.

138. Winship, *Formation of International Sales Contracts Under the 1980 Vienna Convention*, 17 INT'L LAW. 1, 10 (1983).

discern the periods when the offer and withdrawal are effective.

Article 15 of the Convention determines when an offer becomes effective and governs withdrawal of an offer. Article 15 provides a special rule of formation for the situation in which withdrawal overtakes the offer and arrives first. An offer, even if irrevocable,<sup>139</sup> becomes effective only when it reaches the offeree.<sup>140</sup> The power of acceptance arises when the offer takes effect. An offer, whether revocable or irrevocable, may be withdrawn "if the withdrawal reaches the offeree before or at the same time as the offer."<sup>141</sup> Notice of withdrawal prevents the power of acceptance from arising in the offeree, and a contract will not arise from a subsequent acceptance.

The Restatement parallels the Convention in determining the effect of an offer. Under the Restatement, the offeree's power of acceptance arises when the offeror's manifestation of assent is complete.<sup>142</sup> The power of acceptance may be terminated,<sup>143</sup> and a contract cannot be accepted once termination of the power occurs.<sup>144</sup> The rule of receipt governs termination, which occurs when "the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract."<sup>145</sup> As under the Convention, the offeree cannot accept when withdrawal overtakes an offer and reaches the offeree first.

4. *Revocation of an Offer.*—Both the Convention and the Restatement allow revocation of an offer before the offeree has dispatched an acceptance. Revocation of an offer becomes effective when it has reached the offeree.

Article 16(1) of the Convention states, "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." The Convention presumes an offer to be revocable, but it becomes irrevocable upon dispatch of acceptance. An offer continues to be irrevocable until a contract is concluded. A contract is concluded when acceptance becomes effective,<sup>146</sup> which occurs when it reaches the offeror.<sup>147</sup> The rules of the Convention create a hiatus between the dispatch and receipt of acceptance. During this hiatus, the offer has become irrevocable but a

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139. The result is the same whether an offer is revocable or irrevocable because article 15(2) provides that an offer may be withdrawn even if it is irrevocable. Revocation of an offer is discussed in section IV.A.4. *infra*.

140. CISG art. 15(1).

141. CISG art. 15(2).

142. REST. 2d § 35(1) comment b.

143. See REST. 2d § 36.

144. REST. 2d § 35(2).

145. REST. 2d § 42.

146. CISG art. 23.

147. CISG art. 18(2).

contract has not yet been formed.

Domestic common law makes an offer irrevocable upon dispatch of an acceptance, with contract formation also occurring at this point. The power of acceptance is terminated when notice of revocation is received by the offeree.<sup>148</sup> The "mail box rule" makes acceptance effective upon dispatch if done in a manner invited by the offer.<sup>149</sup> The hiatus between dispatch and receipt of acceptance has diminished significance under the mail box rule because a lost or delayed communication does not prevent contract formation once the offer has become irrevocable.

While an offer is presumed to be revocable, it may be made irrevocable by the offeror's statement to this effect or by the offeree's reliance on his power of acceptance. An express statement creates an irrevocable offer under article 16(2)(a) of the Convention and Code section 2-205. Reliance on an offer is a basis of irrevocability under article 16(2)(b) of the Convention and section 87(2) of the Restatement.

Article 16(2)(b) of the Convention states that an offer may not be revoked if it indicates that it is irrevocable. Irrevocability under this provision does not require that the offeror promise to refrain from revocation and does not require consideration supporting such a promise.<sup>150</sup> The Convention position reflects the judgment that in international commercial relations, the offeree should be able to rely on any statement by the offeror indicating that the offer will be held open for a period of time.<sup>151</sup>

Section 2-205 of the Code provides a special rule concerning "firm offers." An offer that indicates that it will be held open for a period of time is not irrevocable for want of consideration if several conditions are met.<sup>152</sup> In addition to giving assurance that it will be held open, the offer must be: (1) made by a merchant, (2) in a signed writing, and (3) separately signed by the offeror near the term of assurance if the contract form is provided by the offeree.<sup>153</sup> If the period of irrevocability is not stated, then the offer remains irrevocable for a reasonable time.<sup>154</sup> In any event, the maximum period of irrevocability is three months.<sup>155</sup>

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148. REST. 2d § 42.

149. REST. 2d § 63.

150. Commentary, art. 14, note 6.

151. *Id.* An offer may indicate its irrevocability in many ways. Irrevocability certainly arises when the offer states that it is irrevocable or will not be revoked for a period of time. *Id.* at art. 14, note 7.

152. U.C.C. § 2-205.

153. *Id. See, e.g.,* Cargill, Inc. v. Wilson, 166 Mont. 346, 532 P.2d 988 (1975) (copies of written contracts for the sale of wheat which contained the terms of an oral agreement and were signed by the seller were binding on the seller as an irrevocable offer).

154. U.C.C. § 2-205.

155. *Id.* Because § 2-205 addresses only offers that are not supported by consideration,

The Code places more conditions on irrevocability than does the Convention. The first condition of Code section 2-205, that a firm offer may be made by only a merchant, has its parallel in the general provision barring application of the Convention to consumer transactions.<sup>156</sup> The section 2-205 writing requirement has no parallel in the Convention because the Convention does not require contracts to be in writing unless a state adopts a statute of frauds, an exercise of the option to override article 11 which is allowed by articles 12 and 96. The three month limit to the period of irrevocability also has no analog in the Convention; the Commentary indicates that an offer should remain irrevocable for a period of time necessary for the offeree to accept. These differences between the Code and Convention allow an offer to be deemed irrevocable under the Convention even though the conditions surrounding a firm offer under the Code have not been met.

A second exception to the general rule of irrevocability arises when there has been reasonable reliance on an offer. This exception addresses the situation in which an offer cannot be evaluated without costly investigation. Article 16(2)(b) of the Convention provides that an offer cannot be revoked "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." An offer inviting such reliance is irrevocable for the time required for its evaluation.<sup>157</sup>

The role of article 16(2)(b) is illustrated by the case of a supplier who knows that his offer to supply building materials will be relied upon by a builder in submitting a bid.<sup>158</sup> It is thought to be reasonable for the builder to rely on the offer because the supplier knew that the builder would incorporate the offer into his bid. Reasonable reliance by the offeree renders the offer irrevocable. If the bid is accepted, the builder has the power to accept the supply offer. The same result is reached under domestic common law.<sup>159</sup>

The domestic common law concerning revocation of an offer is found in section 87(2) of the Restatement. This section creates an exception to the requirement that consideration be present in contract formation.<sup>160</sup> "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the

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the three month restraint does not limit the duration of an irrevocable offer if consideration is present. *Id.* at comment 3.

156. CISG art. 2(a).

157. Commentary, art. 14, note 8.

158. J. HONNOLD, *supra* note 54, at § 144.

159. REST. 2d § 87(2). *See, e.g.,* Jenkins & Boller Co. v. Schmidt Iron Works, 36 Ill. App. 3d 1044, 344 N.E.2d 275 (1976) (doctrine of promissory estoppel used to bind subcontractor to bid because general contractor relied on bid in making his own bid and subcontractor reasonably should have expected such reliance).

160. REST. 2d § 87(2).

part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."<sup>161</sup>

Section 87(2) applies the general concept of reliance<sup>162</sup> to the unaccepted offer. This special application occurs most often when the acts done in reliance on the offer are not part of performance.<sup>163</sup> If beginning performance is a reasonable mode of acceptance, then sections 45 and 62 generate contract formation rather than merely making the offer irrevocable. If reliance is such that the offeree must incur substantial expense, undertake commitments, or forego alternatives in order to make acceptance possible, then section 87(2) creates an option contract, rendering the offer irrevocable. The reliance must be both substantial and foreseeable.<sup>164</sup>

The remedy provided by section 87(2) of the Restatement is to render the offer "binding to the extent necessary to avoid injustice." Full enforcement of the terms offered is not appropriate in all cases; restitution of benefits conferred may be adequate.<sup>165</sup> The remedy provided by Part II of the Convention is to hold the offer open<sup>166</sup> so that the offeree can accept, concluding a contract.<sup>167</sup>

5. *Termination of the Power of Acceptance by Rejection or Counter Offer.*—The power of acceptance is terminated by a rejection of the offer.<sup>168</sup> Termination occurs when rejection reaches the offeror.<sup>169</sup> Article 17 of the Convention states, "An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror." Under section 38(1) of the Restatement, the power of acceptance is terminated by a rejection. Under section 40, termination occurs when the rejection is received. The reason for employing the rule of receipt is that while the offeror should be permitted to make plans<sup>170</sup> promptly and utilize his resources effectively in reliance on the offeree's rejection, such reliance cannot occur until the offeror receives the rejection.<sup>171</sup>

When one communication overtakes and arrives before another, the essential rule is that the power of acceptance is not terminated

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161. *Id.*

162. REST. 2d § 90.

163. REST. 2d § 87(2) comment e.

164. *Id.*

165. *Id.*

166. CISG art. 16(2)(b).

167. CISG arts. 18, 23.

168. CISG art. 17; REST. 2d § 38(1).

169. CISG art. 17; REST. 2d § 40.

170. The reaction of the offeror to a rejection may involve, for example, extending offers to others or revising production schedules.

171. See Commentary, art. 15, note 1; REST. 2d § 38(2) comment a; J. HONNOLD, *supra* note 54, at § 153.

until a rejection reaches the offeror. A contract is not concluded if acceptance of an offer is overtaken by a rejection.<sup>172</sup> If an acceptance arrives before a rejection, then contract formation takes place, the rejection having no effect.<sup>173</sup> When an acceptance and a rejection are both in transit at the same time, the rule of receipt places them in a race to reach the offeror.

The Restatement departs from the Convention on the issue of whether an irrevocable offer is terminated by its rejection. The Restatement provides that the power of acceptance under an option contract<sup>174</sup> is not terminated by a rejection or counter offer.<sup>175</sup> The Convention does not distinguish between revocable and irrevocable offers on the issue of termination by rejection.<sup>176</sup>

An acceptance modifying an offer will sometimes terminate the power of acceptance. If a varied acceptance is deemed a counter offer under article 19(1) of the Convention, then there is an implied rejection of the offer, and the power of acceptance is terminated.<sup>177</sup> If a reply is a counter offer under the criteria of Restatement section 39(1), then the counter offer terminates the power of acceptance under section 39(2).<sup>178</sup> If a varied acceptance arrives before an unconditional acceptance, then it will either terminate the power of acceptance as a rejection or be effective as a varied acceptance.

## B. Acceptance

1. *Manifestation of Assent.*—The chief characteristic of acceptance is the manifestation of assent to the terms of the offer.<sup>179</sup> Acceptance takes effect at different times under the Convention and Restatement. Differences also appear in the ways the Code and Convention treat acceptance by action.

Manifestation of assent is essential to acceptance under the Convention, Code and Restatement.<sup>180</sup> Under the Convention, "A statement made by or other conduct of the offeree indicating assent

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172. CISG art. 17; REST. 2d § 40.

173. CISG art. 17; REST. 2d § 40.

174. An irrevocable offer is termed an "option contract" by section 25 of the Restatement.

175. REST. 2d § 37. Although there are no reported cases deciding whether a firm offer made under section 2-205 of the Code will be terminated by its rejection, Professor Honnold has suggested that a court would not force the offeror to hold the offer open in the absence of consideration. J. HONNOLD, *supra* note 54, at § 154.

176. CISG art. 17.

177. Acceptance modifying an offer is considered more closely in section IV.B.3. *infra*.

178. See, e.g., *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975) (reply to offer of cotton output contract that added projected yields when offer had not indicated anticipated quantity was a counter offer rather than an acceptance; subsequent reply omitting the projected yields was ineffective because power of acceptance had been terminated).

179. CISG art. 18(1); REST. 2d § 50(1); U.C.C. § 2-204(1).

180. CISG art. 18(1); U.C.C. § 2-204(1); REST. 2d § 50(1).

to an offer is an acceptance."<sup>181</sup> Contract formation occurs under the Code when there is a manifestation of agreement.<sup>182</sup> The Restatement defines acceptance as "a manifestation of assent to the terms of [an offer] made by the offeree in a manner invited or required by the offer."<sup>183</sup>

The offeree usually cannot manifest assent through inaction. Article 18(1) of the Convention states, "Silence or inactivity does not in itself amount to acceptance." Acceptance may take place if silence occurs in conjunction with other factors that allow the silence itself to indicate assent. An express agreement concerning the effect of silence may be made under article 6. Such an agreement may also be implicit in the negotiations, course of dealing, trade usage, or other conduct of the parties as interpreted under article 8.

Under Section 69 of the Restatement, silence or inactivity constitutes acceptance if: (a) the offeree knowingly accepts a benefit for which compensation is expected, (b) the offeror expressly or implicitly indicates that silence will be understood as acceptance and the offeree remains silent with the intent to accept, or (c) previous dealings make it reasonable for the offeree to notify the offeror if he does not intend to accept.

An express agreement that an order will be deemed accepted if the seller does not respond within ten days allows acceptance to occur when ten days of silence have passed. A rejection sent by the seller on the eleventh day will have no effect. If parties have developed a practice in which the seller always ships the goods as ordered without acknowledging the order, then the silence of the seller combines with shipment of the goods to produce acceptance. Because silence indicates acceptance within the established course of conduct, the buyer may recover for breach of contract if the seller does not ship the goods and fails to notify the buyer.

It may be difficult to establish the intent to be bound when formation takes place during contract negotiations. If an exchange of communications cannot be clearly identified as an offer and acceptance, the Convention requires close scrutiny of the proposals to determine their underlying intentions. The Code recognizes that contract negotiations may be ambiguous while the conduct of the parties indicates that a binding obligation has been undertaken. In response to this situation, the Code provides that, "An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."<sup>184</sup>

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181. CISG art. 18(1).

182. U.C.C. § 2-204(1).

183. REST. 2d § 50(1).

184. U.C.C. § 2-204(2).

2. *The Moment Acceptance Takes Effect—Dispatch and Receipt Theories.*—The Convention determines the moment acceptance takes effect by the rule of receipt, but the Restatement uses the rule of dispatch. Article 18(2) provides that acceptance “becomes effective at the moment the indication of assent reaches the offeror.” An indication of assent is not effective immediately upon dispatch. Acceptance is effective only if it reaches the offeror within either the time set by the offer or a reasonable time if the term is left open.<sup>185</sup> The receipt theory places the risk of unsuccessful or delayed transmission on the sender-offeree.

The Restatement employs the rule of dispatch, known as the “mail box rule,” in setting the time acceptance takes effect. Acceptance made in a manner invited by the offeror takes effect as soon as it is put out of the offeree’s possession, regardless of whether it ever reaches the offeror.<sup>186</sup> When acceptance is made by a promise, it is essential that either the offeree use reasonable diligence in attempting to notify the offeror or that the offeror receive the acceptance seasonably.<sup>187</sup> Acceptance under an option contract, however, is not effective until received.<sup>188</sup>

Both the Code and Convention recognize acceptance when made by an act as distinguished from a statement, but their notice requirements differ. Article 18(3) of the Convention allows the offeror to indicate assent by performing an act without giving notice to the offeror. This form of acceptance must be sanctioned by a trade usage or course of conduct if it is not expressly invited by the offeror.<sup>189</sup> Paragraph (3) further provides that acceptance is effective at the moment the act is performed.

It is not altogether clear whether paragraph (3) adopts the time of dispatch or receipt as the moment when acceptance by performance takes effect. When read literally, the text of paragraph (3) does not appear to require communication with the recipient-offeror.<sup>190</sup> Although acceptance must indicate assent under paragraph (1) and the indication of assent must reach the offeror under paragraph (2), paragraph (3) keys on the date of performance as the moment acceptance by an act becomes effective. It is reasonable to believe that a particular act must indicate acceptance in an objective manner, which would allow an independent observer to perceive the intention.<sup>191</sup> The requirement of objectivity, however, may serve an evi-

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185. CISG art. 55.

186. REST. 2d § 63(a).

187. REST. 2d § 56.

188. REST. 2d § 63(b).

189. CISG art. 18(3).

190. A literal explication of article 18(3) may be found in Eorsi, *supra* note 128, at 318.

191. Winship, *supra* note 138, at 11.



dentiary function without addressing the question of whether the offeror must be made aware of the act. A literal reading of paragraph (3) relieves the offeree of giving a supplemental indication of assent even though the act is not inherently communicative.<sup>192</sup>

It has been suggested that paragraph (3) does not authorize the offeree to conclude a contract solely by performance if the offeror is not informed within the time period established by paragraph (2).<sup>193</sup> Although paragraph (3) expressly dispenses with a notice requirement, this must be viewed against the background of paragraph (1), under which acceptance requires communication. Notwithstanding the general requirement of communication, it is difficult to see how a notice requirement can be imposed in light of a provision dispensing with notice in special circumstances.

The Code provides that an offer shall be construed as inviting acceptance "in any manner and by any medium reasonable in the circumstances."<sup>194</sup> Acceptance may be made by either a promise or performance if this is reasonable under the terms of the offer.<sup>195</sup> Although the Code allows acceptance to be made by an act of performance, it departs from the Convention by requiring notice of acceptance. Prompt or current shipment of conforming goods is an acceptance,<sup>196</sup> but if the offeror is not notified within a reasonable time, he may treat the offer as having lapsed before acceptance.<sup>197</sup>

A key difference between the Code and Convention is in their writing requirements. The Convention does not impose any requirements on the form a contract may take,<sup>198</sup> but a state may elect to impose a writing requirement.<sup>199</sup> The Code has a special Statute of Frauds applicable to sales.<sup>200</sup>

The Code and Convention both recognize that a party who undertakes acceptance by performance is vulnerable because of his financial commitment to the contract. The Convention protects the offeree by making acceptance effective upon the beginning of performance.<sup>201</sup> The offer cannot be revoked once the offeree has relied on the offer by making an investment in the contract.<sup>202</sup> The Code

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192. For example, if an order invites acceptance by shipment of goods, a literal reading will deem acceptance complete upon shipment of the goods rather than upon the buyer's receipt of supplementary notice or arrival of the goods.

193. J. HONNOLD, *supra* note 54, at § 164.

194. U.C.C. § 2-206(1)(a). Similar language is used in REST. 2d § 30(2).

195. U.C.C. § 2-206(1)(b); REST. 2d §§ 30(2), 32.

196. U.C.C. § 2-206(1)(b).

197. U.C.C. § 2-206(2).

198. Particular reference is made to writing requirements when rejecting all requirements as to form in article 11.

199. CISG arts. 12, 96.

200. U.C.C. § 2-201.

201. CISG art. 18(3).

202. CISG art. 16(2)(b).

relieves a party of the writing requirements of section 2-201 to the extent that specially manufactured goods have been produced,<sup>203</sup> or to the extent that either payment or the goods have been received and accepted.<sup>204</sup> Because they entail a financial commitment, these acts are sufficiently objective evidence of intent to allow the writing requirements to be relaxed.

3. *The Effect of a Varied Acceptance.*—Several issues arise when an acceptance varies the terms of an offer. It must be determined whether a contract has been formed and which terms are included. The battle of the forms—an attempt to secure advantageous terms in an exchange of purposefully drafted printed forms—often provides the setting for a varied acceptance. Both the Code and Convention address these problems directly.<sup>205</sup> The chief difference between the Code and Convention concerns the effect of an acceptance that materially alters the terms of an offer.

Under both the Code and the Convention, a varied acceptance creates a contract if it does not materially alter the terms of the offer.<sup>206</sup> Article 19 of the Convention reaches this result by first laying down a strict mirror image rule requiring exact compliance with the offer. Article 19(1) states, “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.” Paragraph (2) softens the rigid mirror image rule of paragraph (1). If the additional or different terms do not materially alter the offer, then the reply is an acceptance and a contract is concluded.<sup>207</sup> Section 2-207(1) of the Code provides that “[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance *even though it states terms additional to or different from those offered or agreed upon . . .*”<sup>208</sup>

The Code and Convention take different approaches when a varied acceptance materially alters the terms of an offer. Under the Convention, the strict mirror image rule of article 19(1) remains in effect, and the varied acceptance is a rejection and counter offer. As

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203. U.C.C. § 2-201(3)(a).

204. U.C.C. § 2-201(3)(c).

205. CISG art. 19; U.C.C. § 2-207.

206. CISG art. 19; U.C.C. § 2-207(1), (2).

207. CISG art. 23.

208. U.C.C. § 2-207(1) (emphasis added). Additional evidence that the Code has abandoned the mirror image rule can be found in sections 2-204(3) and 2-206. Section 2-204(3) honors a contract even though one or more terms have been left open, allowing contract formation even though the parties have failed to agree on various terms. If the Code supplies a term different from that proposed by the offeror, he may have obligations different from those he proposed. A varied acceptance in the form of a shipment of non-conforming goods may be effective under section 2-206(1)(b).

a rejection, the varied acceptance terminates the power of acceptance.<sup>209</sup> As a counter offer, the varied proposal is subject to acceptance, making it the basis of a contract. An acceptance that materially varies an offer does not conclude a contract under the Convention.<sup>210</sup>

A material variation of the offer does not prevent contract formation under the Code. Acceptance is effective under section 2-207(1) notwithstanding material alterations. Section 2-207(2)(b) protects the offeror by keeping the material alterations from entering the contract.<sup>211</sup>

Materiality ultimately limits application of the Code because a response to an offer may fail to qualify as a "definite and seasonable expression of acceptance or a written confirmation" if the terms vary so greatly that the offeror cannot reasonably treat the response as an acceptance.<sup>212</sup> Such a widely divergent response will be deemed a counter offer, which terminates the power of acceptance.<sup>213</sup>

The special provisions of the Code and Convention are brought into play only when a reply purports to be an acceptance. A reply that makes inquiries or suggests the possibility of additional terms will not invoke either section 2-207 or article 19 if it does not purport to be an acceptance. This feature allows contract negotiations to progress without a counter offer terminating the power of acceptance by rejection.<sup>214</sup>

The offeror may retain control of the terms of the offer by objecting to the varied terms of the acceptance. The Convention provides that if the offeror objects without undue delay, then the varied acceptance is a rejection, and acceptance does not occur.<sup>215</sup> The modifications contained in the varied acceptance enter the contract if the offeror does not so object.<sup>216</sup> Under the Code, an objection by the offeror prevents the modifications from entering the contract, but an objection does not stop contract formation.<sup>217</sup> The Code also allows the offeror to achieve this result with an offer that expressly limits acceptance to the terms of the offer.<sup>218</sup> The Convention will honor an

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209. CISG art. 17.

210. See CISG art. 18(1), (2).

211. See, e.g., *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 569 P.2d 751, 141 Cal. Rptr. 157 (1977) (because discount of 1.4 cents per gallon was a material term in negotiations for sale of oil, term in acceptance allowing the seller to unilaterally revoke discount was a material modification that did not become part of the contract).

212. See U.C.C. § 2-207(1).

213. REST. 2d § 39(2).

214. See CISG art. 17; REST. 2d § 38(1).

215. CISG art. 19(2).

216. *Id.*

217. U.C.C. § 2-207(2)(c).

218. U.C.C. § 2-208(2)(a).

express limitation of the power of acceptance,<sup>219</sup> but a contract will not be formed because a varied acceptance does not indicate assent to an offer that has expressly limited acceptance to the terms of the offer.<sup>220</sup> The result common to both systems is that by objecting to a varied acceptance, the offeror can avoid a situation in which the party having the last word sets the terms of the contract.

Because the Code fosters contract formation even in the presence of material variations and objection by the offeror, the offeree may be drawn into a contract by a varied acceptance. The offeree can avoid contracting under the terms of the offer by expressly making acceptance conditional on assent to the additional or different terms.<sup>221</sup> If a varied acceptance is conditional, then it is a counter offer, and contract formation does not take place.<sup>222</sup> This problem is not as severe under the Convention because contract formation does not occur when there is a material variation or objection.<sup>223</sup> The offeree can be unintentionally bound to only non-material variations from the acceptance when the offeree objects.<sup>224</sup>

If goods are tendered, accepted, and paid for before a dispute arises, it may be clear that the parties intended to contract although it is difficult to identify an offer and an acceptance. The Code contains a special provision removing the need to determine which act or document constituted the offer and which the acceptance in this situation.<sup>225</sup> Section 2-207(3) provides, "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract."<sup>226</sup> A contract based on conduct consists of "those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [the Code]."<sup>227</sup> Because the Convention does not contain a special rule analogous to Code section 2-207(3), it is necessary to discern an offer and acceptance in the conduct of the parties.

4. *The Effect of a Late Acceptance.*—A late acceptance does not conclude a contract under the general rules of the Restatement and the Convention, but a late acceptance is afforded special treatment by a separate provision of the Convention. The general rule of

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219. CISG art. 6.

220. CISG art. 18(1).

221. U.C.C. § 2-207(1).

222. REST. 2d §§ 59 comment a, 39(1) comment b.

223. CISG art. 19(1), (2).

224. CISG art. 19(2).

225. U.C.C. § 2-207 comment 7.

226. Relief from the writing requirements of section 2-201 is available to the extent payment or goods have been received and accepted. U.C.C. § 2-201(3)(c).

227. U.C.C. § 2-207(3).

the Convention, found in article 18(2), is that an offer lapses before arrival of a late acceptance, a late acceptance having no effect upon arrival. Section 70 of the Restatement provides that an acceptance reaching the offeror after the offer has lapsed is a counter-offer. Accordingly, creation of a contract requires acceptance of the counter offer by the original offeror. The differences between domestic law and the Convention originate with article 21 of the Convention, which allows ratification or cancellation of a late acceptance by the offeror. These procedures have no parallels in domestic law.

Article 21(1) allows an offeror to ratify a late acceptance. Paragraph (1) provides that "[a] late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice" that he will honor the acceptance.<sup>228</sup> Paragraph (1) may be invoked when the offeree dispatches his acceptance too late for timely arrival by the means chosen.<sup>229</sup> Although an offer lapses if there is an untimely dispatch of acceptance, the offeror is able to unilaterally conclude a contract by giving notice that he will honor the acceptance.<sup>230</sup> The power to ratify a late acceptance allows the offeror to speculate during the hiatus between the lapse of an offer and arrival of a late acceptance. The offeree can protect himself against price changes during this hiatus by withdrawing acceptance through a means that will reach the offeror before the acceptance.<sup>231</sup>

The mechanics of article 21(1) illustrate a theory that differs from the domestic rationale. Under both the Convention and domestic law, a contract is formed only if the original offeror informs the offeree of his intent to be bound by the late acceptance. The contract formed under the Convention is based on the original offer.<sup>232</sup> Although once void, a late acceptance takes effect upon ratification by the offeror. The effect of the late acceptance is retroactive from the moment of its receipt.<sup>233</sup> The counter offer is the foundation of the contract under domestic law.<sup>234</sup> Notice by the original offeror serves as an acceptance and becomes effective upon dispatch.<sup>235</sup>

Article 21(2) allows an offeree to cancel a late acceptance that would have ordinarily been effective. Paragraph (2) is invoked when an apparent delay in transmission causes an acceptance to arrive late even though given timely dispatch. A late acceptance is automati-

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228. CISG art. 21(1).

229. See CISG art. 21(2).

230. CISG art. 21(1).

231. See CISG art. 22.

232. CISG art. 21(1).

233. Commentary, art. 19, note 3.

234. See REST. 2d § 70 comment b.

235. REST. 2d § 63(a).

cally effective if it bears a date showing that it would have reached the offeror in time had it not been delayed.<sup>236</sup> However, a late acceptance is not effective if, without delay, the offeror gives notice that he considers his offer to have lapsed.<sup>237</sup> There is a burden on the offeror to notify the offeree of the delay in transmission when a dated acceptance indicates that the offeree expected the acceptance to arrive in due time. Failure to notify the offeree that his acceptance will not be honored allows contract formation to occur when acceptance reaches the offeror. If the letter of acceptance is not dated or the date shows a late dispatch, then the offeror may exercise his powers under paragraph (1).

The mail box rule of domestic common law avoids the problem of delays in the transmission of an otherwise timely acceptance because acceptance of a revocable offer is effective upon dispatch.<sup>238</sup> If acceptance is dispatched in a timely manner, it is effective regardless of when it reaches the offeror.<sup>239</sup> Since acceptance of an option contract is not effective until it reaches the offeror,<sup>240</sup> contract formation in this case does not occur if the communication is frustrated.<sup>241</sup>

5. *Withdrawal of Acceptance.*—Withdrawal of acceptance is treated differently by the Convention and Restatement because of the differences in the dispatch and receipt theories of acceptance. A wrinkle in the receipt theory of the Convention overrides the withdrawal rules when acceptance is made by an act. Article 22 of the Convention provides, "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 18(2) deems an acceptance effective at the moment the indication of assent reaches the offeror, but article 18(3) allows acceptance to be effective immediately if done by performing an act. When acceptance is made by action there is no hiatus between the times acceptance takes place and when it takes effect, meaning that acceptance cannot be withdrawn in this situation.<sup>242</sup>

Domestic common law distinguishes between revocable and irrevocable offers in addressing to withdrawal of acceptance. Acceptance of a revocable offer cannot be withdrawn because it is effective

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236. CISG art. 21(2).

237. *Id.*

238. REST. 2d § 63(a).

239. REST. 2d § 63(a) comment c.

240. REST. 2d § 63(b).

241. REST. 2d § 63(b) comment f.

242. The treatment given withdrawal of acceptance by article 22 parallels the withdrawal of offers under article 15. Both illustrate a general principle that a communication may be withdrawn by a subsequent communication that overtakes it. The discussion of article 15 concerning the rule of receipt applies also to article 22.

upon dispatch.<sup>243</sup> Acceptance of an option contract, an irrevocable offer, is not operative until received by the offeror.<sup>244</sup> Accordingly, an irrevocable offer can be withdrawn by a communication that overtakes an earlier acceptance.

### C. Summary

Many provisions of the Convention should be familiar to domestic lawyers, but several provisions will require consideration of the convention's theory of receipt. The criteria of an offer,<sup>245</sup> revocation of an offer,<sup>246</sup> and termination of an offer by rejection<sup>247</sup> each receive similar treatment under the Convention and domestic law. Care must be used when confronting issues concerning the time an offer<sup>248</sup> or acceptance<sup>249</sup> takes effect, withdrawal of acceptance,<sup>250</sup> and the effect of a varied<sup>251</sup> or late acceptance.<sup>252</sup> The rule of receipt and the rule of dispatch call for different approaches to these situations. The presence of differences between the Convention and domestic law should not draw criticism because the international effort is aimed at achieving uniformity. The value of the Convention is that it will be easier to master than the myriad laws of foreign forums that presently govern international transactions.

### V. Conclusion

The value of the Convention is in the degree of uniformity it can bring to the law of international sales. The development of international trade requires that legal obligations be both predictable and free of influence from variations in domestic laws. Because compromise is inherent in an international agreement, the Convention does not conform to American domestic law in all respects. Adapting to international standards will be a worthwhile compromise if it secures the benefits of uniformity.

The substantive rules of the Convention addressing contract formation should prove workable because they are drawn from established practices in various legal traditions. The nonsubstantive provisions of the Convention—its sphere of applicability and the options in ratification—have raised questions over the extent to which the Convention will bring about uniformity. The success of the Conven-

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243. REST. 2d § 63(a) comment c.

244. REST. 2d § 63(b).

245. CISG art. 14; U.C.C. § 2-204.

246. CISG arts. 15(2), 16; REST. 2d § 42.

247. CISG art. 17; REST. 2d § 42.

248. CISG art. 15(1); REST. 2d § 35 comment b.

249. CISG art. 18; REST. 2d § 63.

250. CISG art. 22; REST. 2d § 63.

251. CISG art. 19; U.C.C. § 2-207.

252. CISG art. 21; REST. 2d § 70.

tion will be determined by the answers to these questions concerning uniformity.

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