An International Sales Law for the World: the United Nations Sales Convention

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Contents

This paper introduces the United Nations Convention on Contracts for the International Sale of Goods. There are three parts to the paper. Part A provides basic information about the Convention, while Part B sets out the general benefits of the Convention. Part C then examines particular issues that Korean enterprises and their attorneys should consider when concluding international sales contracts after the Republic of Korea becomes a party to the Convention.

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I. BASIC INFORMATION

1. The U.N. Sales Convention is a multilateral treaty that covers (1) the formation of commercial contracts for the international sale of goods, and (2) the rights and obligations of parties to these sales contracts. The Convention was adopted at a diplomatic conference in Vienna in 1980. It entered into force on 1 January 1988. For a nation that becomes a party to the Convention after 1988 the Convention enters into force approximately one year after an instrument of accession is deposited with the Secretary-General of the United Nations. CISG arts. 89, 99(1),

2. The Convention expressly excludes from its coverage such important issues as contractual validity, the property consequences of a sales contract, and liability for death caused by a defect in the good sold. CISG arts. 4, 5. Moreover, the Convention only covers sales contracts by merchants. It therefore does not govern a number of contracts that are ancillary to an international sales contract: e.g., the agency aspects of distribution and franchise agreements, contracts of carriage and insurance, letters of credit, and dispute resolution clauses.

3. Like the legal rules in most domestic sales laws, virtually all of the Convention's rules are "suppletory" rather than mandatory. Thus, even if a sales contract falls within the Convention's scope, the parties to the contract may agree to exclude the application of all or part of it. CISG art. 6.

Article 6

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

If, for example, the parties expressly agree on when the risk of loss shall pass, then the parties' agreement will displace ("derogate from") the Convention's provisions on this issue.

4. When it becomes a party to the Convention, a State may declare that it is not bound by certain provisions of the Convention if this is expressly permitted by articles 92-96. CISG art. 99. A list of the States that made such declarations is found in the report on the status of texts prepared by the UNCITRAL Secretariat and found on the UNCITRAL website (http://www.uncitral.org). The principal reservations include:

• A State may declare that any provision of the Convention that excuses the need for a writing will not apply in that jurisdiction. CISG arts. 12, 96. The following States have made this declaration: Argentina, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, Russian Federation, and the Ukraine.

• A State may declare that it will not be bound by subparagraph (1)(b) of article 1. CISG art. 95. The following States have made this declaration: Czech Republic, St. Vincent and the Grenadines, Singapore, Slovakia, United States of America.

5. As of 11 September 2003 the following 62 countries are parties to the Convention:

Argentina, Australia, Austria, Belarus, Belgium, Bosnia & Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Saint Vincent & the Grenadines, Singapore,

Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, U.S.A., Uruguay, Uzbekistan, Yugoslavia, and Zambia.

6. Uniform implementation is encouraged by the Convention's directive that regard is to be had to "the need to promote uniformity in . . . application" when interpreting the Convention. CISG art. 7(1). This directive is particularly important because the official text is equally authentic in each of the six U.N. languages: Arabic, Chinese, English, French, Russian, and Spanish. To assist in the uniform application of the convention, the United Nations Commission on International Trade Law has established CLOUT, a clearinghouse at the office of its Secretariat in Vienna, Austria, which (1) receives reports and abstracts of relevant national court cases or arbitral awards from a network of national correspondents, and (2) publishes the abstracts and otherwise make the reports available in a series known by the acronym "CLOUT". UNCITRAL has published 36 compilations and posts the abstracts and an index on its website.

7. There are a growing number of legal commentaries on the Convention. Among the principal texts in North America and Europe are Peter Schlechtriem ed., Kommentar zum Einheitlichen UN-Kaufrecht (Mnchen: C.H. Beck 3rd ed. 2000) and John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (Deventer/Boston: Kluwer, 3d ed. 1999). The second edition of the Schlectriem treatise is also available in English: Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford: Clarendon Press, 1998).

8. Several Internet sources are particularly useful. The most useful is the CISG database of the Pace Law School International Institute of Commercial Law (http://www.cisg.law.pace.edu). The Pace database includes an extensive

collection of case law, a bibliography of legal writings, and the full text of numerous commentaries. Other databases include that for UNCITRAL (http://www.uncitral.org) and Unilex (http://www.unilex.info), both of which set out case abstracts and bibliographic references.

9. The drafting history is available in the proceedings of the 1980 diplomatic conference and in the UNCITRAL Yearbooks. United Nations Conference on Contracts for the International Sale of GoodsOfficial Records (1981) (Sales No. E.82.V.5). There is also an unofficial Commentary on the draft of the Convention submitted to the 1980 conference that was prepared by the UNCITRAL Secretariat. This Commentary appears in the Official Records and is reproduced on the Pace Law School web site.

10. The address of the UNCITRAL Secretariat is U.N. Commission on International Trade Law, Vienna International Centre, P.0. Box 500, A-1400 Vienna, Austria (tel. 43-1-26060; fax 43-1-26060-5813). As noted above, there is an UNCITRAL website in the six United Nations languages

II. THE BENEFITS OF THE CONVENTION

1. By becoming a party to the U.N. Sales Convention, the Republic of Korea will share a single sales law text with most of its principal trading partners. According to the statistics for 2001, the Convention is in force in the Republic's two leading trade partners (United States and China) but not the third (Japan). In addition, virtually all trading partners that are members of the European Union are Contracting States, the leading exception being the United Kingdom. Enterprises with their places of business in the Republic of

Korea and enterprises with their places of business in these trading partners will 'speak a common language.'

2. A common set of legal concepts and legal vocabulary enhances understanding and certainty. Enterprises in the Republic of Korea negotiating with enterprises from other Contracting States face fewer misunderstandings at the time when concluding a sales contract. A single international text may also provide an acceptable compromise solution when the seller and buyer are unable to agree to the same national law as the law to govern their contract. Common rules will also provide greater assurance that disputes between the parties will be resolved in the same way no matter what forum the parties bring their disputes before. A widely-adopted single legal text allows enterprises that trade in several different countries to have a single set of contract documents that do not have to be adapted to the local law of a particular country. These enterprises can train their sales representatives to use these documents and they can provide uniform solutions to common problems.

3. The Convention text is available in the six official U.N. languages and in numerous unofficial languages. If the Convention did not govern, an enterprise that has its place of business in the Republic of Korea will often face the problem of having a sales contract governed by a law the official text of which is published in a language other than Korean. When the Convention governs, however, the trading partners will apply a common text even though they may be reading it in different language versions.

4. The Convention's legal concepts and rules are adapted to transnational trade. This is apparent especially in the rules on the performance obligations of the parties that apply unless the parties agree otherwise. Different 'default'

rules often apply depending on the typical circumstances. Thus, when a contract involves the carriage of goods delivery takes place when the seller hands the goods over to the first carrier. When, however, the contract provides that goods are to be manufactured at a particular place and no carriage is involved, then delivery takes place by making the goods available to the buyer at the place of manufacture. CISG art. 31(a), (b). The drafters were also concerned to avoid national rules drafted primarily with the concerns of domestic trade in mind or rules that had outlived their usefulness in modern trade.

5. The Convention seeks to provide solutions based on observable facts rather than doctrinal application. The risk of loss, for example, usually passes to the buyer when the goods are physically handed over to the first carrier and not when 'title' passes to the buyer. Disputes that turn on evidence of observable facts may be more easily and more quickly resolved without the need for the intervention of lawyers than disputes that turn on the location of legal title.

6. The text of the Convention balances the interests of the seller and the buyer so that, unlike some national sales laws, there is no systematic bias in favor of the seller (exporter) or the buyer (importer). With the possible exception of contract formation by the exchange of conflicting forms, the obligations of the seller and the buyer are balanced and they have similar remedies when the other party has breached.

7. With one exception (CISG arts. 11, 12 and 96) the agreement of the parties and their course of dealing have precedence over contrary rules in the Convention. This allows the seller and buyer to agree to terms resolving potential difficulties in their trade without the worry that a contrary provision

of the Convention will prevail. They may even agree to exclude application of the Convention and return to the situation that now exists before the Republic of Korea becomes a party to the Convention (i.e., private international law rules determine which national law governs).

8. The Convention also recognizes that usages of trade may bind the parties and have precedence over contrary rules in the Convention. Sellers and buyers may agree to make certain usages binding. CISG art. 9(1). Unless they agree otherwise, they are also bound by any usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. CISG art. 9(2). These usages create the parties′ expectations and usually reflect the needs of a particular trade. At the same, the limitations on application of usages that the parties do not expressly agree to protect against surprise on the part of one of the parties.

9. Uniform interpretation of the text is maintained by a growingly sophisticated body of commentaries, court opinions and arbitral awards. There are numerous treatises and a large number of law review articles commenting on the Convention. Most of these are published in English or German but there are also texts prepared in Chinese and Japanese. The leading authors draw upon commentaries from other jurisdictions and propose autonomous solutions to problems and thereby avoid drawing upon national law solutions.

10. A growing body of court opinions and arbitral awardsmore than 1100provides a gloss on the Convention text that enhances common understanding and fills gaps. In addition to the CLOUT abstracts and depositary of opinions in the original language, there are several informal sources make these opinions available. The Pace web site (http://www.

cisg.law.pace.edu) has the most complete collection of references to cases, has links to Internet sources that reproduce the text of opinions in their original language, and has a growing number of translations of opinions into the English language. The Unilex web site (http://www.unilex.info) publishes its own abstracts of decisions and reproduces the full text of many decisions in the original language. In addition, universities in many countries maintain web sites for relevant decisions published in their jurisdictions in the original language. Professor Michael R. Will of the University of Geneva has periodically published citations to court opinions and arbitral awards. For the latest volume, see Michael R. Will, Twenty Years of International Sales Law Under the CISG: International Bibliography and Case Law Digest (1980-2000) (2000). A Digest of these cases is being prepared by UNCITRAL and should be published sometime in 2004.

III. POTENTIAL PITFALLS

Before the Convention enters into force for the Republic of Korea enterprises with their places of business in Korea should review their contracting practices and their contract forms to see if adjust is needed. The following paragraphs address some issues that might be considered. An English-language text that provides contract forms is James M. Klotz, International Sales Agreements: An Annotated Drafting And Negotiated GuideInternational Edition (Deventer/Boston: Kluwer, 1998).

1. Contract term choosing the applicable law

The Convention governs international sales contracts if it satisfies the

conditions of article 1(1) of the Convention.

Article 1

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

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

If the Convention applies to a contract for the sale of goods under paragraph (1)(a) and the parties do not wish to exclude application of the Convention, should they nevertheless incorporate a choice-of-law clause in their contract? There is at least one reason to do so. If a matter is covered by the Convention but there is a gap in the Convention text, article 7(2) directs the reader on how to fill the gap.

Article 7

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

It may be useful, therefore, to incorporate a contract term that confirms that the parties choose to have the Convention govern their contract and states that a particular national law should be looked to in order to fill gaps where there are no relevant general principles. Such a term might read:

"Notwithstanding that the United Nations Convention on Contracts for the

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

If a Korean enterprise concludes a contract with an enterprise which has its place of business in a non-Contracting State but the parties nevertheless wish to have the Convention govern, the parties may agree to a contract term that makes the law of a Contracting State (e.g., the Republic of Korea) the governing law. The contract term should, however, make clear that by doing so the parties wish both to have the Convention, as the relevant sales law in the Contracting State, govern their contract and also to have gaps in the Convention filled by the non-Convention law of that State.

2. Contract term choosing the forum.

Sellers and buyers frequently agree to resolve their disputes in a specified forum, whether judicial or an arbitral panel. Except perhaps with respect to the formation provisions of Part 2, the Convention does not cover choice-of-forum clauses and their validity. If, however, the parties wish to have the Convention govern their contract, they should consider whether the forum they choose is willing and able to interpret the Convention. There are, of course, other factors to consider, such as convenience, but the issue of who will construe the parties' contract may have a significant impact on application of the Convention.

3. Scope-distribution and franchise agreements.

As numerous court decisions have confirmed, the Convention does not govern issues of agency law and intellectual property. This creates difficulty when the relation between seller and buyer includes not only sale of goods terms but also terms dealing with such other matters as representation of the seller by the buyer, confidentiality agreements, and the licensing or transfer of intellectual property. This is particularly true of distribution and franchise agreements which may provide in a single document for all these matters. In some cases these agreements do not provide for the sale of a specific quantity of goods but instead contemplate that the 'buyer' will submit specific orders for goods at a later time. It is not difficult to treat the acceptance of these later orders as concluding separate contracts of sale but it is more difficult to generalize about whether the Convention governs the original framework agreement. The parties themselves may resolve this by an express term making the Convention the governing law but before doing so the parties should review whether the Convention's provisions, especially those dealing with remedies, are appropriate.

4. Contract formation-open price terms.

The Convention gives apparently contradictory directions on the enforceability of terms that leave open the price of goods supplied. On the one hand article 14 requires that a proposal to conclude a contract must "expressly or implicitly [fix] or [make] provision for determining . . . the price" in order to be considered an offer. CISG art. 14(1). The reason given for this conservative approach is to protect a party from proposals that authorize the offeror to fix the price unilaterally (e.g., the supplier of beer or petrol to a nominally independent retailer). On the other hand, article 55 appears to supply

a formula for determining the price: in the absence of any indication to the contrary, [the parties are considered] to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. Article 55 applies when the contract is validly concluded notwithstanding that the price has not been fixed or is not determinable. The uncertainty created by these provisions suggests that parties should expressly state that they intend to conclude an enforceable contract notwithstanding the absence of a fixed price.

5. Contract formation-"battle of the forms."

The law has always had problems resolving issues when the parties exchange forms, such as a purchase order and an order acknowledgment, and neither reads the details of the other party. The Convention provides a strict "mirrorimage" rule that requires that a reply to an offer make no material change to the offer if the reply is to have the effect of an acceptance. CISG art. 19.

Article 19

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

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

acceptance.

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

A reply that modifies the offer is a counter-offer. Commentators disagree about whether performance by the counter-offeree (e.g., the seller ships the goods or the buyer accepts delivery of the goods) is acceptance of the counteroffer. CISG art. 18(1).

Article 18

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

If the counter-performance does not indicate acceptance of the new terms (or if acceptance of the counter-performance does not indicate acceptance of the original terms), the Convention does not have a rule that resolves this dispute and domestic law may govern. Parties will no doubt develop boilerplate clauses purporting to deal with this problem but whether these clauses will be enforceable is questionable because they may be challenged as contrary to good faith.

5. Contract formation-electronic commerce.

More and more sales contracts are concluded over the Internet or by the exchange of e-mails. The Convention entered into force before electronic commerce became a significant phenomenon. In 2001 the UNCITRAL

Secretariat submitted a working paper to the Working Group on Electronic Commerce examined whether the absence of specific reference to conclusion of contracts by electronic communications or to the delivery of some electronic 'goods' by electronic means is significant. Note by the Secretariat, Possible future work in the field of electronic contracting: an analysis of the Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CN.9/WG.IV/WP.91 (2001). This study concludes:

56. It appears that the United Nations Sales Convention is, in general terms, suitable not only to contracts concluded via traditional means, but also to contract concluded electronically. The rules set forth in the Convention do appear to offer workable solutions in an electronic context as well. Some of the rules, such as those relating to the effectiveness of communications, may need to be adapted to an electronic context.

57. The question of applicability of the Convention to electronically-concluded contracts must be distinguished from the question of whether the Convention also covers the sale of virtual goods. As mentioned earlier, the transactions in these kinds of goods (or services) may appear not to be sales, but rather license agreements. The Working group may wish to discuss whether rules derived from the United Nations Sales Convention should be developed for these kinds of transactions.

6. Excluding and derogating from the Convention.

Article 6 authorizes the parties to agree to exclude application of the Convention or to derogate from its provisions. Both exclusion and derogation raise issues when considering the revision of contract terms.

When parties wish to exclude application of the Convention, they should keep two general points in mind: (a) the exclusion should be explicit because some commentators question whether the Convention may be excluded by implication, and (b) the contract term should both exclude application of the Convention and state what law is to govern. A sample clause might read:

"The rights and obligations of the parties under this agreement and the interpretation of the agreement shall not be governed by the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of [the Republic of Korea] and it shall be interpreted under that law."

When parties wish to derogate from the Convention or vary its effects, the parties may do so by merely agreeing to these provisions. For the sake of interpretation, however, it may be desirable to explicitly note the derogation. Thus contract terms might be drafted as follows:

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

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

7. Notice of nonconformity.

A significant number of cases have explored the Convention's rules on the duty of the buyer to inspect goods and to notify the seller of any nonconformity. The Convention rules are set out in articles 38 and 39.

Article 38

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

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

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

Article 39

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

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

Unless otherwise agreed, in other words, a buyer must notify the seller of any non-conformity promptly and, in any event, not later than two years from the date the goods are handed over to the buyer. CISG art. 39. A buyer that fails to act within these time periods may be barred from recovering compensatory damages although it may reduce the price if the failure is excused. CISG arts. 43 & 44.

The decisions construing these provisions vary widely in outcome. Some examine each case in their factual context but not always consistently with similar decisions in other jurisdictions; some create a presumption (30 days) of the 'reasonable time'. The parties are free, of course, to vary the effect of this provision or to exclude it altogether to take into account such matters as the type of goods involved, the difficulty of inspection, and the difficulty of communications. Such contract terms might provide:

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

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

8. Grounds for avoidance.

While the Convention requires evidence that the parties have agreed on all material terms before there is an enforceable contract, once it is established that there is a contract it is difficult for a party to withdraw or terminate the contract without the other party's consent. Thus, if one party breaches the contract the other party may not bring the contract to an end ('avoid the contract') unless the breach was 'fundamental' or, when there has been nonperformance, the breaching party does not perform within a reasonable additional time as requested by the aggrieved party. CISG arts. 25 (definition of fundamental breach), 26 (notice to required), 49 (avoidance by buyer), and 64 (avoidance by seller).

Article 25

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

Article 26

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

Article 49

(1) The buyer may declare the contract avoided:

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

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

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

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 64

(1) The seller may declare the contract avoided:

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

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller

loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

The general principles of discouraging parties from terminating a contract except in serious circumstances and after consultation is also reflected in the Convention's rule that a party may avoid the contract before performance by the other party is due only when it is clear there will be a fundamental breach. CISG art. 72. Similar considerations apply to parties that have concluded installment contracts. CISG art. 73.

9. Remedies, excused performance and hardship.

Some civil law jurisdictions address remedies for breach of contract by providing different remedies for different types of breach (no performance, late performance, defective performance) and by taking into account the fault of the breaching party for some or all of these types of breach. The Convention, on the other hand, does not provide different remedies for the different types of breach and excludes consideration of the fault of a breaching party. In all cases, the aggrieved party, whether buyer or seller, may require the other party to perform unless the court would not order the party to perform in a

comparable domestic transaction. CISG arts. 28, 46 & 62.

In practice, an aggrieved party is more likely to seek damages. The damage formulas are the same for both the aggrieved seller and buyer. Recovery is for the loss suffered as a consequence of the breach without regard to the fault of the breaching party, subject to the aggrieved party's duty to mitigate if possible and the limit on recovery to no more than the total amount of foreseeable damages. CISG arts. 74 (general damage formula and cap on damages), 77 (duty to mitigate). The damage formula, in other words, is a form of strict liability.

To avoid undermining the certainty provided by this damage formula the drafters were concerned that the Convention should restrict the circumstances where the breaching party was excused. The relevant formula is article 79.

Article 79

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

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

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

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

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

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

Because of the general reference to 'impediment beyond [a party's] control' there is a danger that there will be unpredictable and inconsistent opinions. Most commentators recommend that parties who already use 'force majeure' terms in their contracts continue to use those terms and some go further to recommend express derogation from article 79.

This formulation does not require parties to renegotiate their contract obligations or provide for a court to modify the contract because of economic hardship. Most commentators and several court decisions have therefore concluded that national legal rules that provide for such relief in the case of hardship do not apply to international sales contracts governed by the Convention. If the parties wish to have this relief, they may, of course, provide for that relief in their contract. CISG art. 6..

10. Interest.

Modern economic theory and modern commercial practice in most jurisdictions recognizes the time value of money. In these jurisdictions courts routinely enforce agreements that require borrowers to pay interest on moneys borrowed and judgements award interest to compensate for the delay in the

payment of money. Some religions, however, prohibit charging interest. At the 1980 diplomatic conference in Vienna there was agreement that interest could be awarded when the buyer has not paid the price or when the seller has not restored the price following avoidance of the contract but no agreement on what the rate of interest should be or how to calculate that rate. CISG arts. 78, 84(1). There was also agreement that an aggrieved party who could establish a specific loss, such as a seller who borrows money at a high rate of interest because the buyer failed to pay the price, may collect the loss as damages. CISG arts. 74, 78.

Most courts treat the issue of the appropriate rate of interest as beyond the scope of the Convention. They therefore turn to private international law rules to determine the applicable law but there is no consensus on the appropriate choice-of-law rule (e.g., law of creditor, law where payment was to be made, law of debtor, law of the jurisdiction that issued the currency in which the price is to be paid). In the context of this uncertainty, attorneys may wish to advise parties to include specific contract terms such as the following:

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

"The buyer shall pay interest at __ % per annum on delay in paying for the goods. In no other situation will either party be liable for interest." John Honnold, Uniform Law for International Sales 528 n.9 (2d ed. 1991).