SOME REMARKS ABOUT THE 1980 VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS— EMPHASIS ON PUERTO RICO

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Resumen

El 11 de diciembre de 1986 el Senado estadounidense ratificó el Convenio sobre Contratos de Compraventa Internacional de Mercaderías con la condición de que el Código Uniforme Comercial (U.C.C.) mantuviera su presente supremacía normativa en el comercio interno estadounidense. El Convenio se aplicará, por tanto, cuando las partes contratantes tengan sus negocios en países distintos y son signatarios del Convenio, siempre y cuando el contrato se rija por el Convenio. Puesto que Puerto Rico no ha adoptado el U.C.C., el autor, tras resumir las principales características del Convenio, considera que dicho Estado es el foro apropiado para el primer intento de aplicación de esta ley internacional de carácter civil y consuetudinario, especialmente en su comercio con los EE.UU.

INTRODUCTION

The Convention on Contracts for the International Sale of Goods was approved by the 97th Diplomatic Conference in Vienna, Austria on April 11, 1980.[1] The United States of America signed the Convention approximately one year later on August 31, 1981. Final ratification by Congress came five years later on December 11, 1986 when the Senate ratified the Convention with the reservation that Article 1(1)(b) would not apply.[2] Article 1(1)(b) would operate, pursuant to the Supremacy Clause of the United States Constitution, to displace the Uniform Commercial Code's current pre-eminence in U.S. commerce.

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[1]United Nations, *Acta Final de la Conferencia de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías* (Vienna 1980). For the Spanish text, see Annex I. For the English text, see 19 I.L.M. 671.

[2]For the recommendation of the American Bar Association that the United States make a reservation under Article 1(1)(b) of the Convention, see 50 U.S.L.W. 2140.

Puerto Rico has not adopted the U.C.C.; therefore, U.S. ratification of the Convention made it more fully applicable to Puerto Rico than to the United States.[3] Puerto Rico has as its commercial code an amended version of the 19th century Spanish commercial code. Due to this civil tradition, Puerto Rico is the logical forum to test the Convention for appropriateness in the U.S. commercial scene.

The Convention is binding only when the seller and the buyer have their places of business in different states that are party to the Convention.[4] In such a case, a contract that opts for the Convention will be subject to the law thereunder and no other. Professor Farnsworth, citing Article 6 of the Convention, has written that as the Convention allows parties to "derogate from or vary the effect of any of its provisions," the contract controls in a conflict between it and the Convention.[5]

SYNOPSIS

Scope

The Convention applies to international contracts or transactions between merchants for the sale of goods.[6] The term "goods" is not explicitly defined. As noted by Professor Longobardi, the Convention specifically excludes from its coverage sales of stocks, shares, investment securities, negotiable instruments, money, ships, or aircraft; contracts which predominantly are for services or labor, auction sales, or statutorily

[3]*See* 22 I.L.M. 1378. There is an issue as to whether Puerto Rico is a "territory" of the United States, particularly after achieving Commonwealth status in 1952. *See El Colegio de Abogados y la Descolonizacion de Puerto Rico*, 47 Revista del Colegio de Abogados de Puerto Rico (1986); and *Documents on the Constitutional History of Puerto Rico*, Office of the Commonwealth of Puerto Rico (Washington, D.C. 1964).

[4]Article 1(a) of the Convention reads: "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. . . ."

[5]A.E. Farnsworth, *Rights and Obligations of the Seller*, in The 1980 Vienna Convention on the International Sale of Goods, 83-84. (Swiss Institute of Comparative Law (Schulthess Polygraphischer), Zurich, 1985). Article 6 of the Convention states: "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." As the rules of the Convention can be changed by agreement of the parties, they are not *Jus Cogens*.

[6]*See* Article 1(1) of the Convention. Article 2(a) of the Convention, *a contrario*, shows the Convention's application to merchants: "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."

authorized sales are also excluded from the Convention's coverage.[7]

Formation

The agreement of the parties is insufficient by itself to conclude a contract under the Convention.

> [T]he Convention requires more. A purported offer must meet four requirements:
> a. it should be addressed to one or more specific persons;
> b. it should be sufficiently definite;
> c. it should indicate the intention to be bound in case of acceptance;
> d. it has to indicate the goods and expressly or implicitly fix or make a provision for determining the quantity and the price.
> This abundance of criteria serves the security of the consensus. A purported offer may contain anything that does not depreciate the existence of the above-mentioned four criteria.[8]

Definiteness is one of the most troublesome requirements. The offer is considered sufficiently definite if it refers to the goods, and in any form determines the quantity and price. These are the *essentiala negotii* of Article 14. The Convention fails to require the offer to describe the goods in detail, which is unsatisfactory as most goods have several specific features and descriptions.[9]

With respect to quantity, under the Convention it is sufficient if the offer merely indicates that the buyer is willing to buy "any quantity." However, it may be insufficient for the seller to state that he is willing to sell "any quantity."[10] Concerning the price, the situation is similar. It is sufficient that the purported offer does, at least indirectly, fix the price.

The Civil Code of Puerto Rico allows the possibility of the establishment of the price in a sales contract by a third person.[11] If the third person cannot or does not want to establish the price, the contract

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[7]Longobardi, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 Fordham L. Rev. 867. *See also* Article 2 of the Convention. For more on what the Convention includes, see Articles 4(a) and 7-13 (general provisions) of the Convention which explain that:

> The issues raised in disputes between merchants buying and selling goods are covered by the Convention. Questions such as "Is the contract valid?" are only resolved by domestic law. If domestic law does not set forth requirements for validity, the Convention will not be displaced, and its general provisions will be applied.

[8]Gy Eörsi, *Formation of Contracts* in The 1980 Vienna Convention on the International Sale of Goods, 45, (Swiss Institute of Comparative Law (Schulthess Polygraphischer), Zurich, 1985) (discussing Article 14 of the Convention).

[9]*Id.*

[10]*Id.*

[11]Article 1336 of the Civil Code of Puerto Rico, 31 LPRA 3743, states: "In order that the price may be considered fixed, it shall be sufficient that it be fixed with regard to another determinate thing also specific, or that the determination of the same be left to the judgment of a specified person." *See also* Article 1447 of the Spanish Civil Code.

is void.[12] The Spanish doctrine is divided on this question.[13]In *Finlay v. Finlay Brothers and Waymouth Trading Co.*,[14] the Supreme Court of Puerto Rico held that a price may be legally certain though numerically unfixed. Price can legally fluctuate according to market forces on sugar or cattle, or the passage of time.

Another troublesome area in the formation of the contract is the rule concerning acceptance and revocation of an offer. Under Article 16(1) of the Convention, "[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. . . . [A]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."[15]

Under Article 85 of the Puerto Rican Commercial Code, "[c]ontracts executed through correspondence shall be perfected from the time an answer is made accepting the proposition or the conditions by which the latter may be modified."[16]

Thus, we must conclude that under the current Commercial Code in force in Puerto Rico, where contracts are executed by mail, as may usually be the case for contracts for the international sale of goods, consent—that is to say, the concurrence of offer and acceptance—is obtained as soon as the offeree answers, accepting the offeror's proposal. Under the Convention, an acceptance made by letter must reach the offeror in order to perfect the contract. This moment will necessarily be later than the mailing of the letter of acceptance itself.

THE 1980 VIENNA CONVENTION AND THE MAJOR LEGAL TRADITIONS

Sixty-two nations participated in the complex process of negotiation that finally resulted in the Convention. The majority of these nations follow the civil law tradition.

Article 7 promotes uniformity in the future interpretation of the Convention, which will occur through authoritative writings of publicists and through judicial interpretation in countries of different legal traditions. It states:

> In the absence of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith international trade.

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[12]"*Sine pretio nulla venditio est*," Ulpiano, *Digesto*, 18, 1, 1.2.

[13]J. Puig Brutau, *Derecho General de las Obligaciones*, I-II Fundamentos de Derecho Civil at 217 (Bosch, 2d ed. Barcelona 1976).

[14]8 P.R.R. 371 (1905) (official English translation). The original decision, written in Spanish, is reported in 8 D.P.R. 389.

[15]*See* Article 18(2) of the Convention.

[16]10 LPRA 1305.

In this aspect, this writer agrees with Rosett:

> The Convention takes no position on the major issue of jurisprudential process, that is, it explains very little about the role, if any, contemplated for authoritative judicial interpretation. Whether judges hearing cases under the Convention are under a special obligation to decide future cases consistently with earlier cases is unclear. By its form alone the Convention is a code, in the sense that term is used in continental and socialist systems, rather than a detailed set of decisional rules like the U.C.C. For this reason, broad interpretation by scholarly treatises, judicial reasoning by analogy, emphasis on conceptual analysis, and other continental interpretative techniques are to be expected. This concept also suggests less emphasis on common-law *stare decisis*, the following of past judicial authority with attention to decisions turning on the factual circumstances of prior cases.[17]

Good Faith

The good faith provision of Article 7 of the Convention appeared first in Section 242 of the German Civil Code and was adopted by U.C.C. § 1-203.[18] Article 7 makes good faith applicable not only to the performance and enforcement of contracts but also to their formation, where it serves a similar function to that served by the "unconscionability clause" of the U.C.C.[19] In applying the rule, national courts remain free to draw on domestic, hence diverse, conceptions of "good faith." This would lead to a provision that invites conflicting interpretations.[20]

Reinhart argues that through the principle of "good faith" as incorporated in Article 7 of the Convention, the doctrine of fault at the pre-contractual stage, *culpa in contrahendo*, may be incorporated into the Convention by the court even though not expressly adopted by the Convention.[21]

The Puerto Rican courts have held that a duty of good faith bargaining exists for both parties during preliminary negotiations as the negotiations can complement the terms of a subsequent offer. The good faith requirement means "reciprocal loyalty, a mutual confidence that the other

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[17]Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio St. L.J. 264, at 297-8 (1984).

[18]Section 242 of the German Civil Code of 1900 states: "Performance according to good faith: The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage." *German Civil Code* (Forrester, Goren and Ilgen trans., Fred Rothman, New Jersey 1975).

[19]*See* U.C.C. § 2-302.

[20]*Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 Harv. L. Rev. 1991 (1984) (citations omitted). In a footnote to the original text, the author suggests that, "even in a relatively homogeneous society, no common understanding of 'good faith' exists."

[21]G. Reinhart, *Development of the Law for the International Sale of Goods*, 14 Cumberland L. Rev. 89, 100 (1983-84).

will not deceive him."[22] Failure to act in good faith results in pre-contractual liability which may rest on several grounds such as fault, willful misconduct (*dolo*), fraud, abuse of law, or other general principles of law.

Frustration and Impossibility

Article 79(1) of the Convention is an interesting provision dealing with "changed circumstances" which make the performance of a contract substantially more difficult, but not impossible, or in other words, which frustrates the contract. This Article of the Convention provides:

> 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.

It is unclear whether this requires the application of *rebus sic stantibus* or of *pacta sunt servanda.* Puerto Rican law embraces the second principle, which holds that contracts are enforceable as between the parties and must be fulfilled according to their terms.[23] The principle of *rebus sic stantibus* (change of fundamental circumstances) is not expressly embodied in the Puerto Rican Civil Code. Nevertheless, the courts hold that the principle of reviewing a contract where the basic circumstances within which it was produced have been altered has been gaining greater influence as the most widely accepted formula among the different theories for judicially reviewing contracts due to a change of circumstances.[24]

The Supreme Court of Puerto Rico, citing Spanish publicists for authoritative interpretations of the law, points out the necessary requirements for judicial review of a contract on grounds of a change of fundamental circumstances:

> In order for review to be admissible, it is necessary that very special and extraordinary circumstances be present among the following: 1) the unforeseeable nature of the event which has taken place, 2) that performance of the contract be extremely difficult or burdensome, so that it would represent for the promisor an injury out of proportion to the profit anticipated from the contract, 3) that the contract not be

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[22]*See* Producciones Tommy Muniz v. COPAN, 113 Official Translations of the Opinions of the Supreme Court of Puerto Rico 664 (1982) ("It is an illegal exercise of the right [to negotiate and not consummate an agreement] when the holder thereof manifestly exceeds the limits imposed by good faith or social or economic goals.").

[23]*See* Article 1044 of the Civil Code of Puerto Rico, 31 LPRA 2994.

[24]Casera Foods v. Commonwealth, 108 Official Translations of the Opinions of the Supreme Court of Puerto Rico 918 (1979) (citations omitted). The original decision (Casera Foods v. E.L.A.) was reported in 108 D.P.R. 850 (1979) and is reproduced in Pedro F. Silva-Ruiz, *Casos Para el Estudio de las Obligaciones Contractuales*, Editorial UPR, at 24-29 (Rio Piedras, Puerto Rico 1985).

> aleatory or purely speculative, with which the parties intended to take preventive measures for any possible occurrence.[25]

It is interesting to note that due to Llewelyn's exposure to German law, the U.C.C.[26] codified the essence of the rulings issued by German courts to give relief to contracting parties frustrated by the runaway inflation between World Wars I and II. It is not possible to determine whether common or civil law would dominate the solution established in the Convention.[27]

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[25]*Id.*, at 920. Puig Brutau, *supra* note 13, gives a more detailed account of the conditions for the application of the unforeseen risk doctrine, which in a generic sense, encompasses the *rebus* clause:

1) the basic unforeseeability test, which implies a question of fact dependent on each case's circumstances;
2) that there be an extraordinary difficulty, an aggravation of conditions to such a degree the performance would be much more burdensome for the promisor. This does not have to reach the extraordinary stage in which such difficulty would be confounded with impossibility to perform, which is another question of fact on which no general rules can be easily given;
3) that risk need not be the determining cause of the contract, as is the case in aleatory contracts;
4) that there be no fraudulent acts by any of the parties, since the effects of the supposed offenses and quasi-offenses are specifically predetermined by law;
5) that the contract be an installment contract or one projected into the future, so that it has a certain duration, since such a problem does not exist with contracts which are to be immediately performed or those which have been performed already;
6) that the change of circumstances be subsequent to the execution of the contract (since it would otherwise be incompatible with the very concept of an unforseen event) and that it be permanent to a certain degree (an element which is also necessarily concomitant with the required extraordinariness of the change); and
7) that there be a petition by the interested party.

See Casera Foods, *supra* note 24, at 920-1.

[26]U.C.C. § 2-615 (Excuse by Failure of Presupposed Conditions) provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
> (b) Where the cause mentioned in paragraph (a) affects only a part of the seller's capacity, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may also allocate in any manner which is fair and reasonable.
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

[27]Reinhart, *supra* note 21, at 100 (citations omitted).

The Nachfrist

Another interesting institution found in the Convention is the civil law concept of *nachfrist* or "grace period."[28] Article 47 of the Convention states:

> 1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligation.
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> 2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

The "grace period" is expressly stated in Article 326 of the German Civil Code:

> If, in the case if a mutual contract, one party is in default in performing, the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance, or to withdraw from the contract; if the performance has not been made in due time, the claim for performance is barred . . . .

Professor Honnold, one of the Convention's most influential draftsmen, views this provision as stating that if performance is not made in due time, the person not in default who gave notice to the other party, giving him a reasonable period within which to perform his part together with a declaration that he will refuse to accept the performance after the expiration of that period, may withdraw from the contract.[29] This is the period often referred to as *nachfrist*.

This concept of an imposed anticipatory default period is foreign to common law lawyers.[30] The U.C.C. does not explicitly establish notice by granting additional time comparable to *nachfrist*; however, the

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[28]*See also* Article 49(1)(b) of the Convention for the notion of "grace period." It states: "(1) The buyer may declare the contract avoided: (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 . . . ."

[29]John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Sect. 290, at 307 (Kluwer Law and Taxation Publishers, Netherlands 1982).

[30]Reinhart, *supra* note 21, at 99. Reinhart explained the concept of *nachfrist*, saying:

> On breach by either buyer or seller, the injured party is entitled to fix "an additional period of reasonable length" for performance within that period. The injured party may then declare the contract terminated and seek damages regardless of whether the breach can be characterized as a fundamental breach. . . . Civil law lawyers believe that this concept of the *nachfrist* will insure legal certainty for the injured party in international sale transactions. This will also avoid unnecessary hardship for the breaching party.

comments to U.C.C. § 2-309 recommend the use of notice to reduce the uncertainty in the relationship between the parties.[31]

Article 1077 of Puerto Rico's Civil Code, regulating mutual obligations typical of a sale contract, provides that "the court shall order the rescission demanded, unless there are sufficient causes authorizing the court to fix the period."

Clearly the difference between the German *nachfrist* and the Puerto Rican provision is that in Puerto Rico the additional period for performance is granted by the court and only in special circumstances.

Damages and Specific Performance

Finally, Articles 46 and 28 of the Convention are a compromise between the civil law countries that rely predominately on the remedy of specific performance and the common law countries' position not to grant specific relief as readily as in civil law countries.[32]

Article 46 of the Convention embodies the civil law approach: "The buyer may require (specific) performance by the seller of his obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement." Article 28 of the Convention represents the common law approach:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Reinhart is correct in noting that "the end result is that a party can

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[31]Honnold, *supra* note 29, at 307, footnote 8. *See also* Uniform Laws Annotated, Master Edition, vol. 1, Uniform Commercial Code § 2-309, Official Comments 3 and 5.

[32]Article 1077 of the Civil Code of Puerto Rico, 31 LPRA 3052, provides: "(1) The right to rescind the obligations is considered as implied in mutual ones, in case one of the obligated persons does not comply with what is incumbent upon him. (2) The person prejudiced may choose between exacting the fulfillment of the obligation or its rescission, with indemnity for damages and payment of interest in either case. He may also demand rescission, even after having requested its fulfillment, should the latter appear impossible."

For case law of the Supreme Court of Puerto Rico about specific performance, see Federal Land Bank v. Echeandia, Municipio v. Vidal, and Flores v. Municipio, in Pedro F. Silva-Ruiz, *Casos Para el Estudio de las Obligaciones Contractuales*, *supra* note 24, at 112-137. For a doctrinal explanation, see Puig Brutau, *supra* note 13, at 127-149.

ordinarily avail himself of the remedy of specific performance in a civil law country but not in a common law one."[33]

The option of specific performance, as well as the other significant differences between civil and common law traditions discussed throughout this article, makes Puerto Rico, as a civil jurisdiction with a predominately international focus, best suited for applying and testing the impact and success of the Convention in the United States. It is therefore appropriate that any analysis of the Convention's role in the United States begin in Puerto Rico.

[33]Reinhart, *supra* note 21, at 99. *See also* Honnold, *supra* note 29, sections 194-199, at 223-228.