

E. Report of the Secretary-General: incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods (A/CN.9/145)*

I. INTRODUCTION

1. At its tenth session the United Nations Commission on International Trade Law deferred until its eleventh session the question whether the rules on formation and validity of contracts for the international sale of goods should be the subject-matter of a convention separate from the Convention on the International Sale of Goods.¹ Subsequently, at its ninth session the Commission's Working Group on the International Sale of Goods completed its work on the preparation of rules on the formation and validity of contracts. The Working Group noted that it had prepared those rules in the form of a separate convention. Therefore, in order to assist the Commission in its decision, the Working Group requested the Secretariat to make a study of the drafting problems which the incorporation of the rules on formation and validity of contracts into the draft Convention on the International Sale of Goods would entail.² This report is submitted in response to that request.

2. Part II of this report examines drafting problems that would arise from an integration of the specific rules of each draft Convention.

3. Part III of this report contains draft final clauses which would enable a State to ratify the provisions on formation, the provisions on sale or both.

4. Part IV contains a suggested lay-out of the composite text including, when appropriate, amended titles.

5. This report shows that there are no insuperable technical problems to combining the texts into a single Convention if the Commission should wish to make such a decision.

II. DRAFTING PROBLEMS IN RELATION TO INTEGRATION OF SUBSTANTIVE RULES

6. The lay-out for a compositive Convention, which is suggested in Part IV of this Convention, would have seven chapters as follows:

Chapter I.	Sphere of application
Chapter II.	General provisions
Chapter III.	Formation of contracts
Chapter IV.	Obligations of the seller

Chapter V.	Obligations of the buyer
Chapter VI.	Provisions common to the obligations of the seller and of the buyer
Chapter VII.	Passing of the risk

7. In respect of each provision discussed in the report a suggestion will be made as to whether it should be placed in the chapter on sphere of application (chap. I), the chapter on general provisions (chap. II) or in one of the chapters relevant only to formation of the contract (chap. III) or only to sales (chaps. IV to VII). At paragraph 70 there is a chart showing the suggested arrangement of all the articles of the composite Convention.

Rules on scope of application

8. The rules on scope of application of the draft conventions are contained in article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods (cited as Formation)³ and in articles 1, 2, 3, 5 and 6 of the draft Convention on the International Sale of Goods (cited as CISG).⁴

Formation article 1 (1); CISG article 1 (1)

9. The differences between the two texts are as follows:

<i>Formation</i>	<i>CISG</i>
"to the formation of contracts"	"to contracts"
"between parties"	"entered into by parties"

10. The rule in both texts is the same. The two texts could be combined as follows:

"This Convention applies to the formation of contracts of sale of goods between parties, and to contracts of sale of goods entered into by parties, whose places of business are in different States:

- "(a) . . .
"(b) . . ."

Formation article 1 (1); CISG article 1 (1)

11. If the Commission should decide to adopt the suggestion made in paragraph 67 of this report that a State, if it so chose, should be able to ratify only the rules on formation of contracts or only the rules on contracts of sale, a means would have to be devised to

* 29 March 1978.

¹ *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 33 (Yearbook . . . 1977, part one, II, A).

² Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 303 (reproduced in the present volume, part two, I, A).

³ The text of the draft Convention as approved by the Working Group on the International Sale of Goods at its ninth session is found in A/CN.9/142/Add.1 (reproduced in the present volume, part two, I, A, annex).

⁴ The text of the draft Convention as approved by the Commission at its tenth session is found in A/32/17, para. 35 (Yearbook . . . 1977, part one, II, A).

assure that a contracting State is not considered to be a contracting State in respect of the substantive rules it has not ratified. For the suggested solution to this problem, see proposed article (Y) (1), set out in paragraph 68 below.

Formation article 1 (2); CISG article 1 (2)

12. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
“either from the offer, any reply to the offer”	“either from the contract”

13. In both texts the fact that the parties have their places of business in different States is to be disregarded if that fact does not appear by the time the contract is concluded. It would appear that the text used in Formation would be appropriate for a composite text. Alternatively, the two texts could be combined so as to include all of the words currently used in both texts as follows:

“The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.”

Formation article 1 (3); CISG article 1 (3)

14. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
“or of the proposed contract”	“or of the contract”

15. The rule in both texts is the same. The two texts could be combined as follows:

“Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract or of the contract itself is to be taken into consideration.”

Formation article 1 (4); CISG article 2

16. The difference between the two texts in the opening line is as follows:

<i>Formation</i>	<i>CISG</i>
“to the formation of contracts.”	“to sales”

17. The rule in this portion of both texts is the same. The two texts could be combined as follows:

“This Convention does not apply to the formation of contracts of sale or to sales.”

Formation article 1 (4) (a) CISG article 2 (a)

18. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
“at any time before or at the conclusion of the contract”	“at the time of the conclusion of the contract”

19. The rule in the two texts appears to be the same since a seller who had the requisite knowledge before the conclusion of the contract “ought to have known”

of it at the time of the conclusion of the contract, which is the relevant time under CISG. Therefore, it would appear to be appropriate for the composite text to use the Formation text.

Formation article 1 (5); CISG article 3 (1)

20. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
“to the formation of contracts”	“to contracts”

21. The rule in both texts is the same. The two texts could be combined as follows:

“This Convention does not apply to the formation of contracts or to contracts where the preponderant part of the obligation of the seller consists in the supply of labour or other services.”

Formation article 1 (6); CISG article 3 (2)

22. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
“The formation of contracts . . . is to be considered as the formation of contracts of sale of goods”.	“Contracts for . . . are to be considered sales”

23. The rule in the two texts is the same. Simple cumulation of the opening portion of the two texts is awkward. However, the two texts could be combined as follows:

“The formation of contracts for the supply of goods to be manufactured or produced and contracts for such supply are to be considered as the formation of contracts of sale or as sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”

Formation article 1 (7); CISG article 5 (a)

24. The differences between the two texts are as follows:

<i>Formation</i>	<i>CISG</i>
“to the proposed contract and its performance”	“to the contract and its performance”
“at any time before or at the conclusion of the contract”	“at the time of the conclusion of the contract”

25. As to the first difference, there would appear to be no difficulty in cumulating the two phrases.

26. As to the second difference, for the reasons set out in paragraph 19 above, the composite text could use the Formation text.

27. Therefore, the two texts could be combined as follows:

“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 proposed contract and its performance or 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.

Usages and practices which the parties have established between themselves, Formation articles 2, 4 and 6; CISG article 7

28. Although the two Conventions have almost identical rules in respect of usages and practices which the parties have established between themselves, the presentation is sufficiently different to cause difficulties in combining the two texts.

29. Article 7 of CISG is a substantive provision. It states that the parties are bound by usages to which they have agreed (art. 7 (1)) and are considered to have made certain other usages applicable to their contract (art. 7 (2)). Since the usages referred to in article 7 are imported into the contract, any such usage would have the effect of derogating from or varying the effect of any relevant provision of CISG under the terms of article 4.

30. The same result occurs in Formation but by a slightly different technique. In article 2 (2) it is stated directly that the parties may agree to derogate from or vary the effect of any of the provisions of the Convention "as may appear identical to those used in article 7 (2) of CISG to describe those usages which the parties are considered to have made applicable to their contract."

31. In addition, article 4 (3) of Formation, which states rules for interpretation of the acts of the parties, also uses the word "usage" as it is defined in article 6.

32. In a text which combined the provisions of Formation and CISG "usages", as defined, would:

Bind the parties to their terms (art. 7 of CISG and, implicitly, art. 2 (2) of Formation) and, therefore

Derogate from or vary the effect of the provisions of the Convention (art. 2 (2) of Formation and, implicitly, art. 4 of CISG), and

Provide a basis for interpreting the acts of the parties (art. 4 (3) of Formation).

33. It would seem, therefore, preferable to combine the drafting style used in Formation, which relies on a definition, with the drafting style used in CISG, which states a positive rule. Such a text might read as follows:

"(1) Unless otherwise expressly provided in this Convention, usage means any practice or method of dealing 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.

"(2) The parties to a contract of sale are considered, unless otherwise agreed, to have impliedly made applicable to their contract any usage within the definition contained in the preceding paragraph.

"(3) The parties to a contract of sale are bound by any usage to which they have agreed and by any practices which they have established between themselves."

Autonomy of the parties, Formation article 2; CISG articles 4 and 7

34. The rules in the two Conventions in respect of the autonomy of the parties are substantively almost identical. However, because CISG provides rules in respect of a contract which has been concluded

whereas Formation provides rules for the formation of that contract, there are some differences in substance as well as differences in presentation.

35. (a) Article 2 of Formation provides that the parties may "agree to" exclude, derogate from or vary the Convention. Article 4 of CISG does not use the words "agree to". However, it is understood that an agreement is necessary.

36. (b) As noted in paragraph 29 above, article 7 of CISG explicitly states that certain usages are binding on the parties. There is no such explicit statement in Formation. However, it is implicit in article 2 (2) of Formation that such a rule exists.

37. Similarly, article 2 (2) of Formation explicitly states that the provisions of that Convention may be derogated from or varied by, *inter alia*, usages. There is no such explicit statement in CISG. However, it is implicit in articles 4 and 7 that such a rule exists.

38. (c) Article 2 (2) of Formation provides that the agreement of the parties to derogate from or to vary the effect of a provision in the Convention may appear "from the negotiations, the offer or reply, the practices which the parties have established between themselves or from usages". Some legal systems may find it difficult to apply the same rule in respect of the completed contract of sale since such a rule would require a tribunal to resort to the negotiations between the parties to find an agreement which did not appear in the contract itself.

39. Therefore, it may be preferable to have two separate provisions on the autonomy of the parties, one governing formation and the other governing sales. This could be done by adopting an article such as the following. This article could be placed in chapter I on the sphere of application:

"(1) The parties may agree to exclude the application of this Convention and, unless the Convention provides otherwise, may agree to derogate from or vary any of its provisions.

"(2) The agreement to exclude the provisions of chapter III of this Convention or to derogate from or vary the effect of any of its provisions may appear from the negotiations, the offer, the reply, the practices which the parties have established between themselves or from usages."

Form, Formation article 3; CISG article 11

40. There would be no difficult problems of drafting in combining the two texts into a single text.

41. The text of paragraph (1) of the two articles is identical. The first sentence of article 3 (2) of Formation is identical to article 11 (2) of CISG. The second sentence of article 3 (2) of Formation does not appear in CISG. It would appear appropriate to include it in a combined text.

42. Article (X) to which article 3 (2) of Formation and article 11 (2) of CISG refer is not identical in the two Conventions. No redraft is here provided since the redrafting would need to be done in the context of the final version of Formation.

43. In this report it is suggested that the composite text be placed in chapter II, the chapter dealing with general principles, rather than in chapter III, the chap-

ter dealing with formation of the contract. Although it would be more logical from a substantive point of view for this provision to be in chapter III, placing it in chapter II has the advantage that the provision would have effect within a State which ratified the Convention only in respect of either formation of contracts (chaps. I, II and III) or the substantive law of sales (chaps. I, II, IV, V, VI and VII).⁵ This would leave the substantive situation as it currently exists.

Silence as acceptance, Formation article 2 (3)

44. Article 2 (3) of Formation provides that unless the parties have agreed otherwise, a term of the offer stipulating that silence shall not amount to acceptance is ineffective. This provision should be placed in chapter III of Formation as it deals only with rules on formation.

Interpretation, Formation article 4

45. Article 4 of Formation contains rules relating to the interpretation of communications, statements and declarations by and conduct of a party. CISG does not contain a similar provision.

46. In combining the two texts this provision should be placed only in the chapter on Formation and it should begin "For the purposes of this chapter...".

Fair dealing and good faith, Formation article 5

47. Article 5 of Formation contains rules relating to fair dealing and good faith in the formation of a contract. CISG does not contain a similar provision.

48. In combining the two texts this provision should be placed only in the chapter on Formation.

Transmission of communications, Formation article 7; CISG article 10

49. The general rule in CISG, set forth in article 10, is that a communication is effective upon dispatch if it was given by means appropriate in the circumstances. However, articles 29 (2), 30 (4), 45 (2), 47 (1), 47 (2) and 51 (4) provide that the communication in question must be "received" to be effective.⁶

50. The general rule in Formation is that a communication is effective when it "reaches" the addressee. However, a special rule exists in article 15 (2).

51. In order to combine the two texts it would be easiest to follow the pattern found in article 10 of CISG, that unless otherwise expressly provided in this Convention, communications which have been sent by means appropriate in the circumstances are effective upon dispatch. The exceptions to this rule would constitute all those provisions in CISG which currently provide for the receipt rule as well as all communications in Formation, including that in article 15 (2). The communication in article 15 (2) of Formation would constitute an exception to article 10 of CISG since it states its own rule in respect of its effectiveness, a rule which could not easily be absorbed into article 10 of CISG.

⁵ See paras. 60-67 below.

⁶ The French text of article 47 (1) omits the notion of "receipt". This is undoubtedly an error in translation which should be corrected.

52. For those provisions which follow the receipt rule, it would be desirable to use the same word throughout the composite Convention, i.e. to use either the word "receipt" or the word "reaches". Depending on which word was chosen, some consequential redrafting of the various articles might be necessary for grammatical reasons.

53. It would also be desirable that the definition of when a communication "reaches" the addressee in article 7 of Formation apply to when a communication is "received" in CISG. It should be noted that article 7 of Formation was modelled on article 2 (2) of the UNCITRAL Arbitration Rules.

54. Therefore, a composite text to be placed in chapter II incorporating article 10 of CISG and article 7 of Formation might read as follows:

"(1) Unless otherwise expressly provided in this Convention, if any communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

"(2) For the purposes of this Convention, any communication 'reaches' the addressee [or is 'received' by him] when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

"(3) Paragraphs (1) and (2) of this article do not apply to communications made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Limitation of scope of application of Convention, CISG article 6

55. Article 6 of CISG should remain in chapter I on the scope of application. However, it should be amended to indicate that chapters II and III are concerned with the formation of the contract. If this is done, the words "except as otherwise expressly provided therein" could be deleted from the current text of article 6 of CISG. A redrafted text might read as follows:

"This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular this Convention is not concerned with:

"(a) The validity of the contract or of any of its provisions or of any usage;

"(b) The effect which the contract may have on the property in the goods sold; or

"(c) Except as provided in chapters II and III, the formation of the contract."

Rule on specific performance

56. Article 12 of CISG provides that if in accordance with the provisions of the Convention, one party is entitled to require performance of any obligation by the

other party, a Court is not bound to enter a judgement for specific performance unless the Court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

57. This article could be left in chapter II on the general provisions.

Rules on interpretation of the Convention

58. Article 13 of CISG provides that in the interpretation and application of the provisions of the Convention, regard is to be had to its international character and to the need to promote uniformity. Formation does not contain a similar provision. However, there do not appear to be any reasons of policy why it should not.

59. In order for this provision to apply to the entire Convention, it should be located in the proposed chapter II (General provisions).

III. DISCUSSION ON FINAL CLAUSES OF COMPOSITE TEXT

60. If separate conventions for Formation and CISG are prepared, States would have the option to:

- (i) Ratify both texts, i.e. Formation and CISG; or
- (ii) Ratify one text only, i.e. Formation or CISG.

A composite Convention prepared on the basis of no changes of substance must accordingly leave these options unchanged.⁷

Possible techniques in a composite text to preserve the right to ratify Formation or CISG or both

61. The simplest method of enabling separate ratification of Formation or CISG even though they are in a composite text is to place the substantive rules contained in Formation and CISG in separate chapters of the composite Convention and to permit ratification of either the entire Convention or ratification of the Convention with the exception of either the chapter containing the substantive rules of Formation or the chapters containing the substantive rules of CISG.

62. Article 17 (1) of the Vienna Convention on the Law of Treaties recognizes this practice if the treaty so permits or the other Contracting States so agree. As noted in the commentary adopted by the International Law Commission at its eighteenth session on the equivalent draft provision: "Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible."⁸

63. One example of this approach is contained in the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) done at Geneva on 15 January 1959.⁹ Article 45 (1) of this Convention provides:

"Any country may declare at the time of signing, ratifying, or acceding to this Convention, or notify the Secretary-General of the United Nations after becoming a Contracting Party to the Convention,

⁷ See the terms of reference of this report in para. 1 above.

⁸ Para. (2) of the Commentary on draft article 14, *Official Records of the United Nations Conference on the Law of Treaties*, documents of the Conference, (United Nations publication, Sales No. E.70.V.5).

⁹ United Nations, *Treaty Series*, vol. 348, p. 14.

that it does not consider itself bound by the provisions of chapter IV¹⁰ of the Convention; notifications addressed to the Secretary-General shall take effect on the ninetieth day after their receipt by the Secretary-General."

64. A second technique to enable separate adoption in a composite text would be to place the rules presently contained in Formation in one annex and to place the rules presently contained in CISG in another annex. The final clauses would then enable a State to ratify the Convention together with either or both annexes.

65. The Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on 21 November 1947¹¹ is an example of this approach.

Suggested technique for composite Convention

66. The technique of separate annexes would appear to be more suited to cases where the convention contains the basic or central rules and the annexes contain allied rules, usually of a technical nature, than it would be to a convention on the formation of contracts and on the sale of goods.

67. On the other hand, the rules on formation and the rules on sales could conveniently be contained in separate chapters of the Convention. The final clauses could enable ratification or accession in respect of the chapters concerned or later acceptance of the chapter or chapters not covered by the original ratification or accession. The final clauses can make similar provision for denunciation of the Convention as a whole or of certain chapters thereof.

Suggested composite final clause on ratification

68. "Article (Y). Ratification and accession

"(1) A Contracting State may declare at the time of the deposit of its instrument of ratification or accession that it will not be bound by the provisions of chapter III of part I of this Convention or that it will not be bound by the provisions of chapters IV to VII of part I of this Convention.

"(2) A Contracting State which has made a declaration under paragraph (1) of this article may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal takes effect on the first day of the month following the expiration of six months after its receipt by the Secretary-General of the United Nations.

"(3) A Contracting State may denounce this Convention or either chapter III or chapters IV to VII

¹⁰ The Convention has six chapters, as follows:

Chapter I: Definitions

Chapter II: Scope

Chapter III: Provisions concerning transport in sealed road vehicles or sealed containers

Chapter IV: Provisions concerning transport of heavy or bulky goods

Chapter V: Miscellaneous provisions

Chapter VI: Final provisions

It should be noted that a new TIR Convention, signed at Geneva on 14 November 1975, entered into force on 20 March 1978. The new Convention does not enable exclusion of a chapter. The text of the 1975 Convention is found in United Nations document ECE/TRANS/17.

¹¹ United Nations, *Treaty Series*, vol. 33, p. 261.

of part I of this Convention by notifying the Secretary-General of the United Nations to that effect.

“(4) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the Secretary-General of the United Nations.

“(5) A Contracting State which makes a declaration in respect of chapter III or chapters IV to VII of part I of this Convention or which has denounced those chapters shall not be considered to be a Contracting State within article 1 (1) of this Convention in respect of matters governed by the chapter or chapters which it has not accepted.”

IV. SUGGESTED LAY-OUT FOR A COMPOSITE TEXT

69. Should the Commission decide to recommend the adoption of a composite text it would appear neces-

sary to select an appropriate title for the composite Convention. A possible title might be:

“Convention on Contracts for the International Sale of Goods”

70. The chart below sets out a possible order for the articles of a combined Convention, including their sources. Titles for the seven chapters are set out. With the exception of chapter III, these are the titles of the corresponding chapters in CISG. No titles have been suggested for the individual articles. However, the Working Group on the International Sale of Goods has adopted titles for the individual articles in Formation and these titles might be used for the equivalent articles in a composite Convention. Furthermore, at the request of the Commission at its tenth session, the Secretariat has prepared titles for each article in CISG. These titles are to be inserted in the commentary on that Convention which the Secretariat is to prepare.¹²

¹² A/32/17, annex I, para. 11.

<i>Proposed</i>	<i>CISG</i>	<i>Formation</i>	<i>Paragraphs where discussed</i>
Chapter I	Chapter I		
Sphere of application			
Article 1	Article 1	Articles 1 (1), (2), (3)	9-15
2	2	1 (4)	16-19
3	3	1 (5), (6)	20-23
4	4	2 (1), (2)	34-39
5	5	1 (7)	24-27
6	6		55
Chapter II	Chapter II		
General provisions			
Article 7	Article 7	Article 6	28-33
8	8		
9	9		
10	10	Article 7	49-54
11	11	3	40-43
12	12		56-59
13	13		
Chapter III			
Formation of contracts			
Article 14		Article 2 (3)	44
15		4	45-46
16		5	47-48
17-27		8-18	
Chapter IV	Chapter III		
Obligations of the seller			
Articles 28-48	Articles 14-34		
Chapter V	Chapter IV		
Obligations of the buyer			
Articles 49-61	Articles 35-47		
Chapter VI	Chapter V		
Provisions common to the obligations of the seller and of the buyer			
Articles 62-77	Articles 48-63		
Chapter VII	Chapter VI		
Passing of the risk			
Articles 78-82	Articles 64-68		