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LEGISLATIVE COMMENT

THE VIENNA SALES CONVENTION AS A MODEL FOR REGULATION OF INTERNATIONAL CONSUMER TRANSACTIONS

DARIL GAWITH*

I. INTRODUCTION

Previous research by this writer shows that both litigation-based redress and non-litigation-based redress methods[1] for disputed/failed[2] low value[3] international consumer transactions (ICTs) involving uncooperative vendors are not cost-effective.[4] The *Vienna Sales Convention*[5] may, in some way, help to solve

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* B.App. Sc.(EDP), Grad Dip Ed, LLB, PhD, Solicitor, Lecturer, T C Beirne School of Law, University of Queensland

1 See 'Litigation for international online consumer transactions is not cost effective — A case for reform?' (2007) 14 *Murdoch University Electronic Journal of Law* 1 https://elaw.murdoch.edu.au/ re litigation-based redress, and 'Non litigation-based redress for international consumer transactions is not cost effective — A case for reform?' (2006) 3 *Macquarie Journal of Business Law* 115–150 re non-litigation-based redress.

2 The grounds of such disputes or failures contemplated here are non-delivery and wrong (incorrect) delivery of goods, for reasons other than non-performance by a consumer party to an ICT.

3 "Low value" is a term, in this context, which is best not defined exactly. It should be noted though, that in Australia, under s.4B *Trade Practices Act*, the value of a consumer transaction can exceed AUD$40,000.

4 The definition of "cost-effective", for the purpose of this article, is that the total cost of obtaining a remedy will be less than the amount that could be recovered by any legitimate means of obtaining the remedy.

5 UNCITRAL, *United Nations Convention on Contracts for the International Sale of Goods* (1980) http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf. The *Vienna Sales Convention* is sometimes known as the CISG or the VSC.

this problem. Before we consider that possibility however, let us briefly consider why the lack of cost-effectiveness of redress methods for ICTs may be an issue of some importance.

Whatever the reason for the lack of cost-effectiveness of the various redress methods for ICTs, the fact remains that the growth of global e-commerce is being retarded as a result. From the mid 1990s there has been an exponential world-wide growth in the volume of ICTs. According to Australian government data, "on average, approximately one million Australians aged 14 years and over made a purchase online in any given week of 2002–03. This represented an increase of 85 per cent since 2000-01".[6] This is consistent with international trends. According to OECD data,[7] e-commerce sales in the USA,[8] as a share of total retail sales, increased to 1.2% in late 2001, being valued in excess of US$10 billion in 2001. It is likely though, that because of general trust concerns on the part of consumers, such growth has in fact been significantly *retarded* — relative to what it could have been without trust concerns.

According to an OECD survey of online consumers, one of the most significant impediments to engagement in an ICT is consumer concern about the lack of consumer protection, specifically "trust concerns/concerned about receiving and returning goods".[9] This suggests that a solution to the problem of untrustworthiness, for consumers, would lead to an even greater acceleration of e-commerce sales world-wide, benefiting all involved. What lies at the heart of this trust problem is that

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6 Australian Government Treasury, *The Internet and B2C E-Commerce* (2005) http://www.ecommerce.treasury.gov.au/bpmreview/content/discussionpaper/03_chapter2.asp at 21 October 2005.

7 OECD, *Update of Official Statistics on Internet Consumer Transactions* (2002) http://www.oecd.org/EN/home/0,,EN-home-29-nodirectorate-no-no-no-29,00.htm at 28 May 2002.

8 There is no national perspective in this article. Data on the growth of e-commerce in the US is used simply because it is available, from a reliable source. All data in this paragraph is seen as indicative of international trends within an international phenomenon (international consumerism), as indicated by circumstances in the US and elsewhere.

9 OECD, *Update of Official Statistics on Internet Consumer Transactions* (2002) http://www.oecd.org/EN/home/0,,EN-home-29-nodirectorate-no-no-no-29,00.htm at 28 May 2002.

consumer redress for disputed/failed ICTs involving uncooperative vendors is not practically possible, generally speaking, due to the fact that *the cost of obtaining a remedy will be greater than any amount that could be recovered by any of the current means of redress available*. In other words, in considering any of the currently available means of redress for a disputed/failed ICT, it is clear that none of them are "cost-effective", i.e. the cost of redress is greater than any positive effect of any available form of redress — especially true, the lower the value of the consumer transaction.

Now, assuming for a moment that the proposition is correct, and that an elimination of impediments to the growth of e-commerce would be desirable, the lack of cost-effectiveness of current redress methods for ICTs would clearly represent a case for reform. What is the general nature of this lack of cost-effectiveness in current redress methods?

Redress for non-delivery or wrong-delivery in low-value ICTs by means of litigation is generally not cost-effective, wherever litigated, because of the lack of harmony (i.e. full mutual compatibility) amongst various national private international law rules which increases cost, difficulty of enforcement and complexity for litigants beyond that associated with basic (i.e. non-international) litigation, which is already prohibitively expensive as compared with the kinds of losses involved in connection with ICTs.[10]

As for redress for non-delivery or wrong-delivery in low-value ICTs by all means of non-litigation redress methods — including credit card terms, negotiation through foreign lawyers, action taken through foreign public consumer protection authorities, arbitration, online dispute resolution schemes and industry codes of conduct — in every case they are ineffective as remedies for non-delivery or wrong-delivery in low-value ICTs. For example, credit card terms generally only provide protection for "unauthorised use" and thus protection for non-delivery and wrong-delivery resulting from *authorised* use of credit cards is not provided for in any significant way. Also, there is no ultimate enforcement power applicable through non-litigation based

[10] For details, refer to the first article mentioned in n 1.

redress methods generally: there is little an aggrieved consumer can do to obtain satisfaction from a stubbornly uncooperative foreign vendor.[11]

In these circumstances, potential solutions, involving redress methods that don't yet exist, need to be considered. For example, a cooperative approach made at an intergovernmental level may produce beneficial results. The *Vienna Sales Convention* solved many problems in relation to international *commercial* transactions. It is possible that governments may achieve a similar result now for ICTs by using a similar approach.

This comment examines the *Vienna Sales Convention* (the Convention) as an example of a model law which may either itself provide a cost-effective solution to the problem of disputed/failed ICTs or could be seen as something analogous to a potential future solution. The issue here then is whether an examination of the Convention would help, in any way, with efforts to address problems with ICTs.

After an overview of the structure and content of the Convention, this comment looks at the history of the Convention in terms of the factors which lead to its creation, its fundamental objectives and the problems it sought to solve, the extent to which the Convention is applicable or inapplicable to ICTs, and possible reasons why the Convention itself may be inapplicable to ICTs.

The comment then takes a look at how the Convention was implemented, or why it was not implemented, in three countries: Australia, the USA and the UK. This is done to see if there is a diversity of approaches taken by signatories or potential signatories to implementation and adoption of the Convention, perhaps providing some indication of how an instrument protecting ICTs modelled upon the Convention might also be received by the countries of the world.

The comment then examines literature concerning the effectiveness of the Convention as a form of protection for international commercial transactions, and concludes by examining whether it would be reasonable or appropriate to consider amending/extending the Convention to provide

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[11] For details, refer to the second article mentioned in n 1.

protection for ICTs generally, and specifically in relation to the problem of redress for low-value ICTs.

II. VIENNA SALES CONVENTION — STRUCTURE AND CONTENT

The Convention is divided into four Parts. Part I defines the Convention's scope of application (Articles 1–6) and contains general provisions regarding interpretations, usages and requirements regarding contractual form (Articles 7–13). Part II (Articles 14–24) deals with basic contractual formation issues, while Part III (Articles 25–88) contains rules regarding transborder sale of goods and is split into five chapters. The first chapter (Articles 25–29) contains general provisions[12] and the subsequent chapters being concerned with the obligations of the seller (Articles 30–52), the obligations of the buyer (Articles 53–65), the passing of risk (Articles 66–70), and obligations common to both seller and buyer (Articles 71–88). The final part, Part IV (Articles 89–101), contains general provisions on the public international framework concerning such administrative issues as who is the depositary of the Convention. Of some interest in this Part are Articles 91(2) and 96 — which allows flexibility to be had by contracting states through the registration of "reservations" and "declarations", so that any contracting state can sign on to the Convention without being bound by any particular named provision of the Convention.

Therefore, except where indicated, the main provisions of the Convention of potential relevance to breach of contract by a seller in an ICT are Articles 30 to 52, in the chapter concerned with obligations of the seller with reference to delivery and conformity of goods (Articles 31–34 and 35–44 respectively), and the remedies available to the buyer for non-delivery and lack of contractual conformity by the seller (Articles 45–52). Whether such provisions are actually relevant to ICT redress problems is discussed below.

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[12] For example, for the purposes of the Convention, what amounts to a fundamental breach of contract.

III. BRIEF HISTORY OF THE VIENNA SALES CONVENTION

What was eventually to become the Convention originated in the 1920s[13] through efforts by the Hague Conference on Private International Law and UNIDROIT (the International Institute for the Unification of Private Law) to develop an internationally-accepted commercial code to govern transnational sales of goods[14] to "assist to smooth the process of international sales".[15] The basic idea was to have some sort of code to facilitate trade between nations by minimizing or eliminating uncertainty in the minds of international traders; to "reduce the misunderstandings and controversies that can arise when one law governs the seller and a different law the buyer … among the laws of the countries of the world".[16] This was to be achieved by the provision of a set of standardised rules to govern international sale contracts, to stand above national sale of goods laws. As the preamble to the Convention says: "the adoption of uniform rules which govern contracts for the international sale of goods … promote[s] the development of international trade". [17]

After World War Two three draft conventions were created for these purposes.[18] These covered jurisdictional matters in the international sale of goods, applicable law in the international sale of goods, and transfer of title in the international sale of

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13 T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

14 Preamble to UNCITRAL, *United Nations Convention on Contracts for the International Sale of Goods* (1980) http://www.uncitral.org/english/texts/sales/CISG.htm at 28th September 2004.

15 K Sono, *The Vienna Sales Convention: History and Perspective* (1986) http://www.cisg.law.pace.edu/cisg/biblio/sono.html at 11th September 2004.

16 J Honnold, 'The Sales Convention: From Idea to Practice' (1998) 17 *Journal of Law and Commerce* 181–186, 181.

17 UNCITRAL, *United Nations Convention on Contracts for the International Sale of Goods* (1980) http://www.uncitral.org/english/texts/sales/CISG.htm at 28 th September 2004.

18 T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

goods.[19] Unsurprisingly then, because of excessive complexity and a perceived Eurocentric bias in the approach taken,[20] those draft conventions were not well received and UNCITRAL (the United Nations Commission on International Trade Law, established in 1965) created the Convention by integrating and internationalising the prior draft conventions[21] into a single instrument.[22] The Convention was unanimously adopted on the 10th April 1980 by all of the 62 states participating in the United Nations Conference on Contracts for the International Sale of Goods, held in Vienna. [23]

Article 2(a) of the Convention provides that

> this Convention does not apply to sales 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 brought for any such use.

Therefore the Convention is generally not applicable to ICTs, but prima facie leaves the door open to applicability to ICTs in the exceptional circumstances defined in Article 2(a).[24]

That question remains open, but it could arise, for example, where a consumer was buying goods for personal use in

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19 Ibid.

20 K Sono, *The Vienna Sales Convention: History and Perspective* (1986) http://www.cisg.law.pace.edu/cisg/biblio/sono.html at 11th September 2004.

21 This was done without including jurisdiction provisions.

22 Analysis of the three draft conventions from which the Convention originated is beyond the scope and purpose of this article which is only concerned with an inquiry into the relevance and usefulness of the Convention to problems with ICTs.

23 K Sono, *The Vienna Sales Convention: History and Perspective* (1986) http://www.cisg.law.pace.edu/cisg/biblio/sono.html at 11 h September 2004.

24 Mo's explanation for this is that the "unless" exception, which appears in the wording of Article 2(a), "is probably necessary for the purpose of maintaining the integrity of the consumer protection law of each member" J Mo, *International Commercial Law* (1997), 148. Such reasoning is hard to understand if the Convention alone is the choice of law of parties to a sales contract. In other words, if the Convention *plus* a national consumer protection law is mentioned in a contract, the "unless" exception is no longer applicable anyway as the seller would then be aware that the other party is a consumer.

commercial quantities, thereby creating the appearance of being a commercial buyer.

It will therefore be understood here that the Convention is never applicable to ICTs, as others[25] also understand it; and this view is supported by the attitude of a working group of UNCITRAL, reported in March 2004. The working group was developing a legal framework for the use of electronic communications in connection with international contracts, and specifically on the application of that framework to contracts governed by other conventions, including the Convention. From that a policy proposal emerged which involve a blanket exclusion of consumer contracts through the *elimination* of the "unless" exception in Article 2(a)-type provisions (see above) noting that

> consumer advocates wanted this exclusion because the convention was not itself going to provide what they consider adequate protections …[and] … no one wanted to have to draft a consumer protection convention.[26]

Thus parties interested in consumer protection do not themselves see enough protection in the Convention, if it were simply without Article 2(a), and the working party saw the task, perhaps, of adding an entire consumer protection layer to the Convention as too problematic.

Thus the issue as to whether or not the Convention applies to consumers in exceptional circumstances appears to be all but officially settled in the negative.

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[25] T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005. and D Sloan, *The United Nations Convention on Contracts for the International Sale of Goods — an Overview* (2004) http://www.johnstonbuchan.com/pubs/trade/UNConventionFebruary2004.pdf at 2 August 2005.

[26] S Shartel, 'Working Group Clarifies Application Issues, Excludes Consumers, in Convention Revision.' (2004) 9 *Electronic Commerce & Law* 314–316, 316.

IV. IMPLEMENTATION OF THE VIENNA SALES CONVENTION IN AUSTRALIA, THE USA AND THE UK

The question now is to whether there is a diversity of approaches taken by signatories or potential signatories to adoption and implementation of the Convention and, if so, whether that would be an advantage for a Convention-based ICT protection convention.

A. *Implementation by Australia and the USA*

The Convention was given the force of law in the Australian state of Queensland by the *Sale of Goods (Vienna Convention) Act* 1986 (Queensland). The Convention is a schedule to, and forms the bulk of, that Act. The Convention became collectively part of the law of each Australian state and territory on 1st of April 1989 under a uniform scheme agreed upon by the federal government and all state and territory governments, with an Article 93 (territorial) reservation indicating which parts of Australia the Convention does and does not apply to.

With respect to Australian federal law, section 66A of the *Trade Practices Act* 1974 provides that the Convention overrules the Product Safety and Product Information division of the *Trade Practices Act* (Division 1A) to the extent of any inconsistency.[27] Steinwall's annotated *Trade Practices Act* however notes that section 66A provides that in the event of any inconsistency between the *Trade Practices Act* generally and the Convention, the Convention provisions apply;[28] and that the Convention "itself will extend to every international sale unless specifically excluded in whole or in part".[29] In any event, Article 2(a) of the Convention expressly excludes its application to consumer transactions.

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[27] Section 66A of the *Trade Practices Act* 1974 says "the provisions of the [Convention] adopted at Vienna, Austria, on 10 April 1980, prevail over the provisions of *this* Division to the extent of any inconsistency" — emphasis added.

[28] The better view however appears to be the narrower interpretation based on the actual wording "…prevail over the provisions of *this* Division …".

[29] R Steinwall, *Annotated Trade Practices Act 1974* (2000), 259–260.

The Convention entered into force in the USA on the 1st of January 1988, with an Article 95 declaration restricting the role of private international law rules in determining the application of the Convention.

The role played by the registration of declarations in the implementation of the Convention illustrates the appealing flexibility the Convention offers to countries contemplating adoption. Such flexibility may be imitated.

B. *Non- implementation by the United Kingdom*

As of late 2005 the United Kingdom was not a signatory to the Convention [30] "perhaps because of pride in its longstanding common law legal imperialism or in its long-treasured feeling of the superiority of English law … despite the fact that major and influential trading nations … are parties to the CISG".[31] In fact 65[32] countries are currently signatories and, despite Maniruzzaman's speculation, the United Kingdom may still accede. The United Kingdom's Department of Trade and Industry has noted that "the [Convention] should be brought into national law when there is time available in the legislative programme".[33]

V. EFFECTIVENESS OF THE CONVENTION

As potential signatories are sovereign nations, each is free to choose whether and how they shall become a party to the Convention. Likewise, a wide diversity of approaches could be taken by potential signatories to an instrument protecting ICTs

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30 Pace Law School, *CISG: Table of Contracting States* (2005) http://www.cisg.law.pace.edu/cisg/countries/cntries.html at 1 August 2005.

31 Ibid — quoting A.F.M. Maniruzzaman.

32 Ibid.

33 A Azzouni, *The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom* (2002) http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html at 1 August 2005. This view was confirmed in S Moss, 'Why The United Kingdom has not ratified the CISG' (2005-06) 25 *Journal of Law and Commerce* 483 http://www.uncitral.org/pdf/english/CISG25/Moss.pdf, where the reason given for non-implementation is that "Ministers do not see the ratification as a legislative priority".

modelled upon the Convention, at least so long as such an instrument was not so "flexible" as to lose its effectiveness. Such a possibility could be avoided through good drafting.

The question arises now as to how effective[34] the Convention is as a form of protection for international *commercial* transactions, and whether the Convention is a good model upon which to base a convention to protect ICTs.

Furthermore, apart from the meaning given above, the definition of "effective" here may be expanded by secondary criteria. Such secondary criteria could include popularity — as measured by volume of acceptance by numbers of states internationally (65 so far[35]), or by proportion of international trade in goods moved being covered by contracts involving Convention-signatory countries (two-thirds globally[36]) — which could also be an indicator of how effective the Convention is. After all, popularity, of itself, is strongly suggestive that the Convention may be effective: people probably wouldn't like it if it wasn't effective.

Beyond that, effectiveness could also be measured by degree of perceived attainment of internally-stated objectives,[37] or the extent to which the Convention assists aggrieved parties to Convention-governed/related contracts. It could also be measured hypothetically by how effective the Convention might be if it actually did cover ICTs.

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[34] The meaning of "effective" here includes "producing a decided, decisive, or desired effect".

[35] Pace Law School, *CISG: Table of Contracting States* (2005) http://www.cisg.law.pace.edu/cisg/countries/cntries.html at 1 August 2005.

[36] T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

[37] That is, did the signatory nations think that the Convention does what its preamble says it intends to do — "promote the development of international trade"? This could be measured by the extent of difficulty or otherwise, that was involved in its acceptance by States across a widely diverse geographic, economic and political background. The narrower the acceptance against that background, probably the lesser the degree of perceived attainment of the Convention's internally-stated objectives.

Commencing with the secondary criteria, if the Convention did actually cover ICTs — by being amended to make it "applicable" to ICTs by simply deleting or modifying Article 2(a) — the Convention as it currently stands is still not designed for cost-effectively obtaining and enforcing judgments with respect to failed/disputed low-value ICTs. This is because the Convention does not contain consumer protection provisions (such as those found in Part V of Australia's *Trade Practices Act* 1974[38]), it does not address, much less solve, the potential jurisdiction (choice of court), recognition and enforcement problems associated with ICTs,[39] nor is it underpinned by or associated with any kind of judicial infrastructure to achieve cost-effectiveness in respect of low-value ICTs such as might be found in a small claims tribunal, cyberjurisdiction, or some combination of both. Furthermore, amending the Convention to achieve all of such functionalities would be almost unthinkable given the 50 years it took to get where it is, and the fact that such amendments would probably ruin its popular simplicity. On this view however, the value of the Convention to this article is as a model for the part of a potential ICT solution which would cover such issues as contract formation, party obligations, and remedies. So to that extent, the Convention is a useful model here.

There is also the question regarding effectiveness as measured by the extent to which the Convention assists aggrieved parties to Convention-governed/related contracts. This is a factor which would be virtually impossible to gauge without conducting either some kind of direct "user satisfaction" survey to obtain express statements of attitude, or by indirectly trying to do the same thing through analysis of judicial rulings regarding disputed Convention-related contractual disputes. Unfortunately, neither is possible within the scope of the present article. The indications however — implied by the volume of Convention-related litigation (low: "the number of reported cases [since 1980] in

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[38] Part V prohibits, for example, misleading or deceptive conduct, and false representations, by a corporation, to consumers, in trade or commerce.

[39] As the direct result of Article 6 (which allows parties to derogate from or vary the effect of any of the Convention's provisions), or the indirect result of the fact that no Convention Article provides choice of court rules.

which the Convention's provisions have been considered or applied exceeds 1,000"[40]) as a miniscule proportion of global popularity of the Convention (high: the proportion of international trade in goods moved being covered by contracts involving Convention-signatory countries is two-thirds globally[41]) — suggest that "user satisfaction" with the Convention may be very high. This is a scenario that drafters of some international conventions may wish to emulate. On this basis too, the Convention may be of some value as a model.

There is also the question about effectiveness as measured by degree of perceived attainment of internally-stated objectives. Sono says that the criteria driving the development of the Convention out of the previous draft Hague Conventions were that they were "not suitable for worldwide acceptance … [being] too dogmatic, complex, predominantly of the European civil law tradition and lacked clarity even for lawyers"[42] and what resulted was "simplicity, practicality and clarity [and was] free of legal short hand, free of complicated legal theory and easy for businessmen to understand."[43] As noted above, "the Convention was unanimously adopted on the 10th April 1980 by all of the 62 states participating in the United Nations Conference on Contracts for the International Sale of Goods, held in Vienna."[44] Unanimous adoption by 62 countries "representing quite different legal systems"[45] and with "relatively few amendments to the draft UNCITRAL text"[46] is strongly suggestive that there

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40 T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

41 Ibid.

42 K Sono, *The Vienna Sales Convention: History and Perspective* (1986) http://www.cisg.law.pace.edu/cisg/biblio/sono.html at 11th September 2004.

43 Ibid.

44 Ibid.

45 T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

46 K Sono, *The Vienna Sales Convention: History and Perspective* (1986) http://www.cisg.law.pace.edu/cisg/biblio/sono.html at 11th September 2004.

was a high degree of attainment of internally-stated objectives as perceived by the signatory states. Also, the Explanatory Note to the Convention, says that

> UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system.[47]

This is another basis for viewing the Convention as a good model, to some extent.

There is also an issue about effectiveness as measured by popularity or acceptance. Arguably this may be a good criteria of measuring effectiveness because, while there may be good arguments for why the Convention is or is not "effective", the simple fact is that if people like it and use it, then it may be effective enough. As noted above, popularity, of itself, is suggestive that the Convention may be effective. Furthermore, if providing a mechanism like the Convention to do the same thing for ICTs could be as popular, perhaps that might be enough for a start.

What commentators may think are the strengths and weaknesses of the Convention should now be considered. As for favourable commentary, Sono says that

> the essential characteristics of the [Convention] are simplicity, practicality and clarity. It is free of legal short hand, free of complicated legal theory and easy for businessmen to understand … and [the Convention itself] admits that some matters are not covered and are left to be resolved by the law applicable under the traditional rules of private international law.[48]

This view, and direct consideration of the Convention itself, suggests the drafters achieved their aim of having a text comprehensible to lay persons, with contractual flexibility.

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47 http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf, Explanatory Note, paragraph 4. Accessed 5th April 2007.

48 Ibid.

Sloan says that the Convention's provisions are

> well-drafted and logically arranged [and that lawyers see the Convention as] good law that promotes fair solutions without affording any obvious or hidden advantages to either side [and that the Convention] represents reasonable compromises on difficult commercial issues acceptable to most.[49]

This is consistent with Sono's view that the Convention is easy to use, while lacking in bias towards sellers or buyers, a view supported by McNamara who says that the Convention is "fair … well drafted … [and] to the extent that the parties have equal bargaining strength [the Convention is] neutral … good law."[50]

As for criticism, Sloan claims that

> some practitioners feel that there is too much uncertainty and unpredictability associated with the Convention. Courts, practitioners and merchants alike have not yet developed a full understanding of the Convention and for this reason there has not been uniformity in its application,[51]

while McNamara says that "after sixteen years, the CISG is only now graduating from obscurity"[52] — which may not be especially negative points at all as such instruments take time to acquire general acceptance.

In respect of "some matters [not covered by the Convention]" that Sono refers to, McNamara says that "the CISG has a number of 'gaps' that, by design or otherwise, simply were not

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[49] D Sloan, *The United Nations Convention on Contracts for the International Sale of Goods — an Overview* (2004) http://www.johnstonbuchan.com/pubs/trade/UNConventionFebruary2004.pdf at 2 August 2005 — quoting, in part, V Cook, 'CISG: From the Perspective of the Practitioner' (1998) 17 *Journal of Law and Commerce* 343-353.

[50] T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

[51] D Sloan, *The United Nations Convention on Contracts for the International Sale of Goods — an Overview* (2004) http://www.johnstonbuchan.com/pubs/trade/UNConventionFebruary2004.pdf at 2 August 2005.

[52] T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

addressed".[53] Such gaps include trade terms, applicable interest rate, burden of proof, validity of penalty clauses, transfer of title, existence of agency relationship, forum selection clauses, limitations period, currency of payment, lacking a competent international tribunal for conflict resolution, and allowance for too many "reservations" by potential signatories.[54] Such alleged "gaps" may arguably be excused on the grounds of allowing flexibility — for allowing the adoptability and usability of the Convention, while being curable through user-defined terms — and especially so as "gaps" in an instrument that is no more than a model for a like instrument (in other words, the gaps need not be duplicated in the development of an instrument for ICTs, based upon the Convention). As to gaps in the Convention being curable through user-defined terms, Article 6 allows parties to "derogate from or vary the effect of any of its provisions". Thus the parties may enjoy "freedom of contract" to define their contract by use of particular terms to suit their own specific agreement, while using the Convention as a "default setting" to provide general contextual provisions.[55] Ironically however, it is "freedom of contract", among other things, which (to that extent) may spoil the Convention as a model for an international consumer protection law.

VI. AMENDING THE CONVENTION

A question may now be asked as to whether the Convention should be amended to handle redress for ICTs. Implicit within that question are the following associated questions. Is there an essential difference between the business-to-business (B2B) and

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53 Ibid.

54 Ibid., and J Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 *New Zealand Business Law Quarterly* 336–347, 345–346.

55 D Sloan, *The United Nations Convention on Contracts for the International Sale of Goods – an Overview* (2004) http://www.johnstonbuchan.com/pubs/trade/UNConventionFebruary2004.pdf at 2 August 2005. and T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005.

business-to-consumer (B2C) transactions such that a regulatory regime for B2C transactions, completely additional to that for B2B transactions, needs to exist; and can B2B laws simply be modified to regulate B2C transactions?

As to the first associated question, the views of Vaughan and Martin should be noted. Vaughan thinks that consumers are different to corporations, and Martin thinks that corporations possess sophistication which consumers do not.

According to Vaughan[56] "the main difference between B2B and B2C is the buyer, whose expectations, choice of suppliers and product, payment method and purchasing requirements vary dramatically". While this is not a juridical approach to the question, Vaughan's perspective is a reminder that consumers are indeed different, or at least can be different from corporations, and a pointer back to basic considerations regarding whether consumers should be protected by law at all. On this point Martin, for example, says that

> B2B contracts justify the adherence to traditional "freedom of contract" principles in a way that B2C contracts do not. Businesses may be presumed to possess a measure of sophistication in commercial bargaining which individual consumers do not.[57]

To argue that the existence of two different types of law — trade practices law to regulate B2B and consumer protection law to regulate B2C — is evidence that there is a difference between them requiring separate laws, is a circular argument, and thus the discussion must fall back on whether or not consumers should be protected by law at all — a subject outside the scope of this article.

As developed societies do say that consumers need special protection by law, as they can be abused by excessive use of "freedom of contract" by vendors (who enjoy inequality of

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[56] M Vaughan, 'Business or Consumer E-Commerce — What's the Difference?' (2000) 50 *Telecommunications Journal of Australia* 1–2, 1.

[57] M Martin, 'Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business to Consumer E-Commerce' (2002) 20 *Boston University International Law Journal* 125–159, 132..

bargaining power and informational asymmetry[58] in their favour), a regulatory regime for B2C transactions, additional to that for B2B transactions, does need to exist. Interestingly it is not just the potentially excessive freedom given to sellers by Article 6 (in respect of the formulation of contractual terms) that may be a problem, it is also that a consequence of Article 6 is that the Convention has no mandatory force, meaning that the Convention need not regulate any kind of international sales contracts *at all*.[59]

As to the second associated question, "Can B2B laws simply be modified to regulate B2C transactions?", the Convention (as already noted) and the Hague Convention on Private International Law (as noted below), both of which purport in some way to regulate international B2B transactions but could have been made to apply to consumer transactions, both make themselves expressly inapplicable to ICTs.

With respect to the Convention, because of a narrow reading of Article 2(a) of the Convention, as already noted, the Convention is never applicable to ICTs (as others understand it likewise[60]), a position supported by the attitude of the working group of

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58 Inequality of bargaining power and information asymmetry are two of the principal justifications for consumer protection law and, while they can and often do coincide, that is not always the case. A consumer may suffer from inequality of bargaining power not because of information asymmetry but also where, for example, the transaction is "forced" upon them through a standard form contract presented to the consumer by the vendor. The consumer may be aware of and understand the relevant issues all too well but, because of the circumstances, there may be no real potential for negotiation of terms: C Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (2005), xi.

59 R Burnett, *Law of International Business Transactions* (3rd ed, 2004), 4.

60 T McNamara, *Graduating from Obscurity: The U.N. International Sale of Goods Convention* (2004) http://www.dgslaw.com/articles/565324.pdf at 31 July 2005. and D Sloan, *The United Nations Convention on Contracts for the International Sale of Goods — an Overview* (2004) http://www.johnstonbuchan.com/pubs/trade/UNConventionFebruary2004.pdf at 2 August 2005.

UNCITRAL reported in March 2004 as expressed by their proposed elimination of the "unless" exception in Article 2(a).[61]

With respect to the Hague Convention, a document entitled "A preliminary result of the work of the informal working group on the judgments project", dated March 2003, may be viewed at http://www.cptech.org/ecom/jurisdiction/Prel_Doc08(e).doc.
This document, in its preamble, shows that the working group is concerned with matters concerning "parties to commercial transactions", and in its draft Article 1 clause 2, states, "this Convention shall not apply to agreements between a consumer and another party." The reason for this is apparently that

> the initial scope of the [draft] project was very wide and encompassed jurisdiction rules for all kinds of commercial transactions (B2B, B2C and C2C) and torts, etc. … [and when that] draft was sent out for consultation to the Member States of the Conference, *it was seen as too ambitious* by many stakeholders … consensus could not be reached … [which has now] led to Member States to take a different approach for the time being and start with an uncontroversial core convention, which is Choice of Court in B2B cases.[62]

It does seem then, by weight of reason and empirical evidence, that while the Convention might hypothetically be substantially amended to handle low-value ICTs, it probably never will be nor should be. The conclusion then is that if a Convention-type instrument to protect ICTs was required, it would have to be a separate instrument and not a modified version of the Convention itself.

VII. CONCLUSION

The Convention contains provisions regarding contract formation, party obligations and party remedies, and provisions which effectively amount, to some extent, to harmonised private

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[61] S Shartel, 'Working Group Clarifies Application Issues, Excludes Consumers, in Convention Revision.' (2004) 9 *Electronic Commerce & Law* 314–316, 316.

[62] A Schulz, Email, 8th January 2004 — emphasis added. At the time, Dr Andrea Schultz was First Secretary of the Hague Conference.

international law rules (e.g. the Convention as the governing law); and, to handle ICTs, it needed specific consumer protection provisions, and provisions for a judicial infrastructure appropriate for low value ICTs. An ICT law, based on such findings from consideration of the Convention, would not be expensive to use, as compared with the current cost of transnational litigation, depending upon the best meaning of "provisions for a judicial infrastructure appropriate for low value ICTs" — a cheap, international "small claims court" perhaps.

The Convention appears to be well-received, world-wide, with respect to simplicity, practicality and clarity, and if the low level of Convention-related litigation in the past 25 years is any indication, it may be so well-constructed as to obviate the potential for evasive litigation through differing regional laws and drafting ambiguities — thus amounting to a high level of effective enforceability.

This comment has shown that in terms of redress, the nature of the difference between B2B and B2C transactions is so great that the Convention could not, in practical terms, be considered as modifiable for the purposes of failed/disputed ICTs. While an internationally-coordinated approach is undoubtedly desirable, this comment has shown that an internationally-coordinated approach — similar to that employed by the Convention for international B2B transactions — coupled with technology to obtain efficiencies for low-value disputes, is achievable to handle the problem of litigation-based redress for low-value ICTs, but that modifying the Convention itself to achieve such aim is probably inappropriate. This is because the Convention does not contain consumer protection provisions, it does not address the potential jurisdiction (choice of court), recognition and enforcement problems associated with ICTs, nor is it underpinned by or associated with any kind of judicial infrastructure to achieve "cost-effectiveness" in respect of low-value ICTs.

The advantage of the Convention however, to those contemplating it as a model for an ICT convention, is that its qualities — including simplicity, practicality, clarity, flexibility, neutrality and universality — could be imitated.

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