Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods

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INTRODUCTION

International sale contracts are generally governed by the national law of a given country, determined in accordance with applicable rules of private international law or in terms of an express choice of law clause, on application of the widely accepted principle of party autonomy. In the absence of clear choice of law, however, the selection of the governing law in accordance with conflict rules is complicated, among others, by the simple fact that most domestic sales laws are not tailored to meet the specific needs of modern international sales.[1]

To avoid the inconveniences arising from the application of domestic laws to international situations, the law of international trade has developed bases for a common understanding of the obligations arising from international sales through the establishment of uniform substantive rules.

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] is the most notable recent example in this regard. Concluded under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), the CISG creates a comprehensive statutory legal framework for international sales between parties with places

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[1]See generally S Viejobueno 'Private international law rules relating to the validity of international sales contracts' (1993) 26 *The Comparative and International Law Journal of Southern Africa* 172–174; H Booysen 'The international sale of goods' (1991–2) 17 *South African Yearbook of International Law* 72–5.

[2]United Nations Convention on Contracts for the International Sale of Goods signed in Vienna on 11 April 1980 UN Doc A/CONF 97/18 Annex 1 (1980) reprinted in United Nations Conference on Contracts for the International Sale of Goods, OR 176 UN Doc A/CONF 97/19, UN Sales No E 81 IV 3 (1981) and in (1980) 19 *International Legal Materials* 668.

of business in different contracting states.[3] The CISG is intended to replace the two 1964 Hague Sales Conventions which attracted relatively few (nine) ratifications, mostly from Western European states.[4]

The CISG came into force on 1 January 1988, following the ratification by the required minimum number of ten states. As of February 1994, thirty-seven states, among them major trading nations such as the United States and several EU countries, had ratified or acceded to the CISG.[5]

THE CISG AS A PRODUCT OF COMPROMISE

The significance of this convention as a first step towards global unification of the law of international trade has been highlighted.[6] An organised regulation of international sales contracts will develop as the business community begins to speak in the same legal language. The coming into force of the convention would furthermore justify the conclusion that, in global terms, the political, ideological and juridical impediments that acted as doctrinal and political obstacles to international cooperation in the present field have, to a large extent, been removed.[7] [8]

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[3]The convention is divided into four parts. Part I outlines the CISG's sphere of application and its general provisions, including rules on interpretation, usages and requirements of contractual form. The two basic aspects of the sales transaction are regulated in Part II on formation of the contract, and Part III on the obligations of the seller and the buyer arising from the contract. Part IV deals with the procedure to bring the convention into force and with authorised reservations. Major commentaries on the sales law, in English, include J Honnold *Uniform law for international sales* (1991); C Bianca & M Bonell (eds) *Commentary on the international sales law — The Vienna 1980 Sales Convention* (1987); F Enderlein F & D Maskow *International sales law* (1992).

[4]The two conventions are the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) reprinted in (1972) 834 *UNTS* 107 and in (1972) 834 *UNTS* 169. When it became evident that the 1964 Conventions would not attract widespread adherence, UNCITRAL established a Working Group of fourteen states representing the different regions of the world. The Working Group completed its work based on the 1964 Sales Conventions in nine annual sessions. A consolidated draft was transmitted to the United Nations General Assembly which convened an international conference of plenipotentiaries to consider the draft. The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna from 10 March to 11 April 1980. At the end of the conference the texts prepared by the committees were considered in a plenary session and approved unanimously in six equally authentic languages.

[5]They are: Argentina, Australia, Austria, Bulgaria, Bosnia-Herzegovina, Byelorussia, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Guinea, Hungary, Italy, Lesotho, Mexico, Netherlands, Norway, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States of America, Russia, Yugoslavia and Zambia. B Pilz 'Neue Entwicklungen im UN-Kaufrecht' (1994) 17 *Neue Juristische Wochenschrift* 1101. As far as could be ascertained, South Africa is not a party to the convention.

[6]A Goldstajn 'Usages of trade and other autonomous rules of international trade according to the UN (1980) Sales Convention' in P Sarcevic & P Volken (eds) *International Sale of Goods, Dubrovnik Lectures* (1986) 57.

[7]Schmitthoff has stated 'The ideological and economic division of the world would not provide an obstacle. The successful operation of countries of different social ideology and in a different stage of economic and industrial development within the framework of UNCITRAL proves this. Faithful to its original brief, UNCITRAL has

Unification of sales law at a global level depends on a certain readiness for compromise on the part of the states involved, in order successfully to integrate different concepts and ideas into an independent, workable and meaningful system of international sale rules.[9] But willingness to compromise is found in unequal measure in the various countries involved. In particular, each country's bargaining position in the world of international trade is likely to determine the actual need and strategy for compromise to be followed in a given case. Countries that conduct an extensive international trade, for instance, have less incentive to compromise than others, since their major multinational corporations are often in a position either to impose conditions to contract, or to persuade their less powerful partners to do so under their own terms.

In what follows examples of where progress in establishing legal uniformity could be achieved at the Vienna Conference only through a process of negotiation and compromise will be described. This is an important aspect of the convention. Not only does it highlight the significant structural differences among the nations represented in Vienna, but, most importantly, it contributes towards a better understanding of the many gaps and shortcomings of the uniform law in a number of important aspects of the sale contract. If the need for compromise in a process of international legal unification is readily accepted, it will be easier to evaluate the legal foundation laid down by the CISG as a necessary step towards the elimination of the uncertainty created by the application of private international law rules.

SOME REPRESENTATIVE ISSUES

Compromises reached in the process of drafting the CISG reveal, in

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restricted its technical task of removing legal barriers to the flow of international trade and has been little affected by the divisive effect of politics'. C Schmitthoff 'The codification of the law of international trade' (1985) *Journal of Business Law* 37. To developing countries, for example, the fact that the CISG was the product of UNCITRAL — an organ of the United Nations General Assembly — was a decisive factor, in that 'it removed the political objection that was levelled at the previous uniform sales laws produced by non-universal institutions' S Date-Bah 'Problems of the unification of international sales law from the standpoint of developing countries' in Problems of Unification of International Sales Law; Colloquium of the International Association of Legal Sciences Potsdam August 1979 *Digest of Commercial Laws of the World* (1980) 44.

[8]At the same time, however, the fact that the CISG is the product of economically and politically dissimilar countries cannot be overlooked. Even if the topic of international sales is not political but, rather, economic in nature, the aims of the New International Economic Order written into the preamble of the 1980 Vienna Convention contain political elements. In addition, the preamble acknowledges the 'different social, economic, and legal systems' which 'are to be taken into account in developing a uniform law for international sales'.

[9]G Eörsi 'A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 *American Journal of Comparative Law* 345; E Hayes Patterson 'United Nations Convention on Contracts for the International Sale of Goods: Unification and the tension between compromise and domination' (1986) 22 *Stanford Journal of International Law* 283. See also A Garro 'Reconciliation of legal traditions in the UN Convention on Contracts for the International Sale of Goods' (1989) 23 *The International Lawyer* (1989) 443.

particular, the conceptual gaps existing between the civil law and the common law legal traditions, as well as the tensions, on matters of legislative policy, between developing and developed countries on the one hand, and capitalist and socialist states on the other. As Eörsi points out:

> The innocent reader might in some instances have the impression that the draftsmen of the Convention could not really live up to expectations. Though it may happen that, in a heterogeneous and periodically changing group consisting of a great number of delegations from different States an unexpected decision which cannot be remedied later may occur, this, however, happens rarely and mainly in the hasty last days of the conference. If the reader finds provisions which seem to be unreasonable, he should attribute them to a compromise solution veiling an issue which could not be resolved. He may be fairly sure that a compromise was practically the only way to avoid a deadlock. It is better to have a questionable compromise than to endanger the success of the whole undertaking.[10]

Furthermore, the convention, like any other legislative text, contains a number of provisions that are open to different interpretations and by its own nature is unable to anticipate all the problems to which it will be applied. To the extent that the CISG is the product of compromise rather than consensus,[11] the delicate balance of interests between buyers and sellers from dissimilar countries which is reflected in many of its provisions should be preserved, rather than supplanted by domestic judicial interpretation.[12]

Common law — civil law

One of the most frequent criticisms directed at the two Hague Sales Laws of 1964 was that their drafting style was too similar to that traditionally used for codification in civil law countries. They were, furthermore, considered too abstract and dogmatic by jurists from other legal systems.[13]

The situation changed during the preparation of the CISG, when many common-law based principles of contract law gained considerable ground, despite the fact that the method of codification and the style remained essentially continental.[14]

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[10]G Eörsi 'General provisions' in N Galston & H Smit (eds) *International sales: the United Nations Convention on Contracts for the International Sale of Goods* (1984) 2-12.

[11]Garro n 9 above at 481.

[12]Hayes Patterson n 9 above at 283 quotes the following paragraph from D O'Connell '[A] treaty ... often represents a compromise of vital political interests. To interpret it without reference to the struggle for compromise is gravely to over-simplify the problem of treaty application'.

[13]Eörsi n 9 above at 347; see n 4 above.

[14]A commentator has noted: 'When the common lawyer looks at the CISG [therefore] with its relatively laconic provisions and its dearth of definitions, he feels a sense of unease. This sense is particularly acute if, as in my case, the common lawyer is an American, who is especially accustomed to prolixity, not only in statutes but in judicial opinions and contracts and other legal instruments as well'. E Farnsworth 'Problems of the unification of sales law from the standpoint of the common law countries' in *Problems of unification* n 7 above at 7.

It has been noted that, within UNCITRAL, most of the debates between delegates from civil and common law jurisdictions concentrated on legal technique, rather than on political or economic issues, as opposed to other instances where conflicts of interest between developed and developing countries dominated the debate almost to the exclusion of any other consideration.[15]

Some of the issues that emerged as particularly problematic in this category were the following: (1) whether counter-value should be required for the enforcement of an agreement which modifies or terminates a contract, *ie* the role of the common law notion of 'consideration'; (2) whether an offer should become effective at the time of the offeree's dispatch of the acceptance or at the time the acceptance reaches the offeror; (3) whether an offer stating a fixed period for acceptance should be considered irrevocable; and (4) whether the primary remedy for breach of a contract of sale should be specific enforcement or alternative relief.[16]

The role of the common law doctrine of consideration

The traditional common law doctrine of 'consideration' refers to a counter-value, *ie* an act or a promise which must be given, not only when contracts are originally formed, but also when pre-existing contracts are modified.[17] Thus, an agreement to modify a contract which affects the obligations of one of the parties may be ineffective if it is not supported by an act or promise given in exchange for a new promise.[18] In contrast, civil law jurisdictions do not impose any comparable restriction and are not familiar with the doctrine.

The convention has omitted any reference to consideration. Common law delegates did not object to the omission, since the restrictions posed by the doctrine on the parties' ability to adapt their transaction to new circumstances had already generated pressure for modifications of this traditional common law rule.[19]

In terms of article 29(1) of the CISG 'a contract may be modified or terminated by the mere agreement of the parties'. The language of the article indicates that the intention of the drafters was to make it clear, for the benefit of common law jurisdictions, that no consideration would be required to make binding modification or termination agreements.[20]

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[15]Garro n 9 above at 453.

[16]*Idem*.

[17]S Date-Bah 'Modification of contract' in Bianca n 3 above at 242.

[18]Honnold n 3 above at 278.

[19]The Uniform Commercial Code rejected the rule in § 2-209(1), which states that 'an agreement modifying a contract within this Article needs no consideration to be binding'. Article 29(1) of the CISG follows this approach. The agreement of the parties need not be explicit but may be based on conduct (art 18(3)) or on practices established between the parties or on usages of trade (art 9); see Honnold n 3 above at 279.

[20]S Date-Bah n 17 above at 241.

Perfection of the contract

In the area of the formation of contracts, the convention adopts familiar rules in terms of offer and acceptance. A classic dichotomy between the civil and the common law rules relates to the moment when the contractual declaration becomes effective, *ie* at the time of dispatch or at the time of receipt.

The civil law approach is that an acceptance is not effective, hence the contract is not perfected, until it reaches the offeror. At common law, the so-called 'mail-box rule' makes a written acceptance effective upon dispatch. This difference of approach, however, proved of minor practical consequence at the Vienna Conference. Although the receipt theory was adopted for the most part, a compromise was reached in terms of which the wording of the rules on contract formation reflects both solutions.

As in ULF, the offer and the acceptance, as well as the withdrawal of such declarations and the rejection of an offer are only effective if they reach the other party.[21] An important exception appears in article 16(1), which stipulates that an offer may not be revoked if the revocation reaches the offeree after the dispatch of the acceptance (thus adopting the mail-box rule of the common law). Consequently, while receipt is crucial for the effectiveness of the offer, dispatch remains the standard to determine the timeliness of its revocation.

Revocability of offers

The convention distinguishes, on the one hand, between the revocation of an offer that has already reached the addressee and is therefore fully effective (article 16) and, on the other hand, the withdrawal of an offer that has not yet reached the addressee (article 15(2)).

The antagonism between legal systems that permit the revocation of offers and those that prefer to bind the offeror to an offer made had already dominated the debate at The Hague.[22] Similarly, the revision of the rules on revocability contained in ULF was described as 'one of the more difficult tasks that UNCITRAL encountered in its work on formation of sales contracts'.[23]

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[21]See articles 15(1) (offer), 15(2) (withdrawal of the offer), 16(1) (rejection of the offer), 18(2) (acceptance) and 22 (withdrawal of the acceptance) CISG.

[22]Article 4(2) of the 1958 draft on formation of contracts (which later became ULF) followed the principle prevailing in civil law jurisdictions and provided that an effective offer was irrevocable unless the offeror had reserved the right to revoke in the offer. This proposal was at the centre of a controversy at the 1964 Convention, the result of which was a switch in the text of the ULF from the civil law to the common law. In what has been described as a compromise solution (see Bianca n 3 above at 151), article 5 of ULF permitted revocation of an effective offer, subject to good faith, fair dealing and an indication of the intention of the offeree to consider his offer to be firm or irrevocable. The inclusion of 'good faith' and 'fair dealing' in connection with the revocability of offers was abandoned in UNCITRAL, on the ground that these principles were considered too vague to be used in the context of revocability of offers.

[23]Honnold n 3 above at 208.

Most civil law systems operate on the assumption that when a person makes an offer, the offeror impliedly gives the addressee a reasonable time in which to consider it and respond. Accordingly, in these systems an offer is presumed to be irrevocable for a reasonable time unless otherwise indicated by the offeror. Under French law, for instance, although the revocation of an offer is permitted — particularly if it states a fixed time for acceptance — the offeror is bound to indemnify the offeree or to pay damages in case of revocation.[24] Under common law, the opposite view prevails: the offeror is free to revoke the offer at any time before the offeree has accepted it.[25] In addition, as a consequence of 'a historical remnant of the doctrine of consideration',[26] the revocability of an offer under the common law is not affected by a promise not to revoke it, unless a payment or some other thing is given or an act performed by the offeree in exchange for the promise to hold the offer open.[27]

The contradiction which exists between these two patterns of contract formation forced the delegates at the Vienna Conference to find an acceptable compromise. The provision of article 16 paragraph 1 of the CISG follows the common law rule that an effective offer may be revoked until it is accepted. However, two important exceptions contained in paragraph 2 restrict the offeror's power to revoke on two alternative grounds: (a) a promise or other indication by the offeror that the offer is irrevocable; or (b) acts by the offeree in reliance on the offer.[28]

Paragraph (2)(a) seems to follow a familiar civil law rule, while paragraph (2)(b) offers the same to common law based legal systems. This reasoning, however, was not followed in the discussions of the Working Group which prepared the CISG. A number of delegations did not fully understand the 'reliance doctrine' of subparagraph (b), while common law delegations adopted their own interpretation of sub-paragraph (a).[29]

For a civil law lawyer, it would be natural to accept that if a fixed time for acceptance is given, as provided in sub-paragraph (a), this indicates that the offer is irrevocable until the expiry of the stated period, although not thereafter. For a common law lawyer, on the other hand, the time fixed for acceptance would only mean that an answer has to be given within this

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[24]G Eörsi 'Revocability of offer' in Bianca n 3 above at 155.

[25]Farnsworth n 14 above at 12.

[26]Eörsi n 24 above at 155.

[27]See Honnold n 3 above at 205.

[28]Article 16 reads: '(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
(2) However, an offer cannot be revoked (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.'

[29]Eörsi n 24 above at 156; Honnold n 3 above at 206 *ff*.

period, but is not in itself sufficient to make the offer irrevocable.[30]

The compromise solution of article 16(2)(a) does not fill the gap between the common law and the civil law conceptions on the irrevocability of offers that state a fixed time for acceptance.[31] As Eörsi points out, it is rather an example of what he calls a compromise *'reservatio mentalis'*, *ie* a compromise entered into with mental reservations on each side, each one maintaining its own view on what was agreed.[32] In particular, it is possible that the mention in the offer of 'a fixed time' — which was understood by some delegates to be an irrebuttable presumption of an intent to be bound — may be subject to different interpretations, depending on the legal system in which the offeror operates.

Specific performance

The disparity between the civil and common law approaches to the law of sales was particularly evident in the field of remedies for breach of contract. In this area, the scope of the remedy requiring specific performance of contractual obligations was 'one of the most stubborn issues encountered in the preparation of the uniform rules'.[33]

The system of remedies for breach of contract of the CISG includes a general rule in the sense that a party in breach may be compelled to perform his obligations. In terms of the convention, when the seller deviates from any of his contractual duties, 'the buyer may require performance by the seller of his obligations'.[34] Similarly, when the buyer fails to perform any of his obligations, 'the seller may require the buyer to pay the price, take delivery or perform his other obligations'.[35] Furthermore, the right to demand specific performance under the convention is not conditional on the inadequacy of damages or the absence of a substitute transaction.[36]

The civil law systems rely on specific performance as the natural remedy in

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[30]A commentator from a common law jurisdiction (the US) refers to article 16(2)(a) in the following terms: 'Unhappily, however, this seemingly simple phrase contains the seeds of dispute between common and civil law lawyers. Consider the case of the offeror who says, "This offer shall lapse in ten days"'. A common law lawyer would read this as intending to set a limit on the period during which the offeree could accept, but not as designed to restrict the offeror's power of revocation. Surely the offeror ought to be permitted to set a time for lapse (*ie* termination) without losing the power to revoke.' Farnsworth n 14 above at 13.

[31]Eörsi n 9 above at 355, Farnsworth n 14 above at 13, P Schlechtriem *Uniform sales law* Manzsche (1986) 53.

[32]Eörsi n 9 above at 354.

[33]Honnold n 3 above at 267.

[34]Article 46(1) CISG.

[35]Article 62 CISG.

[36]B Nicholas 'The Vienna Convention on International Sales Law' (1989) 105 *The Law Quarterly Review* 220 comments that 'to the common law mind this is surprising, but the omission was not due to an oversight [since] a proposal to rectify it was made at the Vienna Conference but was rejected'.

case of breach of obligations related to the performance of a contract.[37] They proceed on the premise that specific redress should be ordered whenever possible, unless the disadvantages of the remedy outweigh its advantages. The main exceptions are indicated for cases where specific relief is impossible, would involve disproportionate cost, would introduce compulsion into close personal relationships, or would compel the expression of special forms of artistic or intellectual creativity.[38] The logic of the civil law is re-enforced by practical considerations in former socialist countries which lacked markets in which aggrieved parties could arrange substitute transactions. For purely economic reasons, they, too, preferred the remedy of specific performance.[39]

The situation is quite different under common law systems. Common law courts have traditionally awarded damages for breach of contract but have not, for the most part, granted specific relief, in particular, if there is a market in which the buyer can obtain substitute goods.[40] The basic tenets of the common law on remedies for breach of contract indicate that, once the breach has materialised, an attempt should be made to put the promisee in the position he would have been in had the contract been performed, and that this should be done in terms of alternative rather than specific relief.[41]

Differences in principle on this point between civil and common law narrow down considerably in practice. First, even in non-common-law jurisdictions, litigants very often prefer the remedy of damages to that of specific performance, for purely practical reasons.[42] In addition, comparative studies have shown that there are significant differences among civil law

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[37]E Farnsworth 'Legal remedies for breach of contract' (1970) 70 *Columbia Law Review* 1151.

[38]C Dawson 'Specific performance in France and Italy' (1959) 57 *Michigan Law Review* 495 quoted in Farnsworth *idem*. In France, a distinction is made between promises 'to give' and those 'to do or not to do'. As to the latter, the system for enforcement of court orders of specific performance (called *astreinte*), consists of the payment of a sum of money.

[39]Farnsworth n 37 above.

[40]Farnsworth n 14 above at 13. Only when the damage remedy was inadequate did separate courts of equity dispense specific relief.

[41]E Farnsworth 'Damages and specific relief' (1979) 27 *American Journal of Comparative Law* 247. The author bases this approach on the following analysis: 'Taken as a whole, these tenets are designed to accord with the goal of economic efficiency in a free enterprise economy. For the good of society, its resources should be efficiently allocated at every point in time. It is therefore in society's interest that each economic unit reallocate its resources whenever this would lead to greater efficiency. Even if a party is bound by a contract to allocate his resources in a particular way, the good of the society requires that he break the contract and reallocate his resources whenever this makes him better off without making someone else worse off. This reasoning supports, for example, substitutional rather than specific relief, because such compulsion would discourage reallocation.'

[42]Nicholas n 36 above at 220; also O Lando 'Specific performance' in Bianca n 3 above at 235 ('The difficulties and delays in obtaining the very goods contracted for will in most cases discourage the aggrieved party from suing for specific performance'). Similarly Enderlein ('The authors of this commentary agree in that the right to performance is rarely asserted') n 3 above at 121.

approaches to enforcing contractual promises.[43] In particular, the sanction in civil law jurisdictions against a recalcitrant party who does not abide by a decree for specific performance often consists in converting the aggrieved party's interest in the enforcement of the decree into a sum of money. Thus, to state that civil law systems 'require' performance actually means, in certain situations, that substitute performance will be purchased at the expense of the obligee, a remedy that closely resembles the common law action to fix the defendant's damages.[44]

From a practical point of view, then, the situation in civil courts in which an action for specific performance is brought will probably coincide with those in which a common law court would generally enter a judgment for specific performance, *ie* where the goods contracted for are unique, such as heirlooms and precious objects of art, where goods have been made specially for the buyer, in situations of scarcity and where the seller has a monopoly in the goods contracted for.[45]

Given the wide theoretical disparity which existed between delegates from the different legal systems, it was clear that a compromise would have to be reached at the Vienna Conference with regard to the extent to which specific relief would be recognised.[46]

As seen, the CISG grants specific performance on a wider scale than does the common law. At the same time, several restrictions limit the operation of this remedy.[47]

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[43]A comparative overview of the different domestic laws may be found in H Dölle *Kommentar zum einheitlichen Kaufrecht* (1976) at 109 *ff* (with further references).

[44]Honnold n 3 above at 193 with further references; see also Lando n 42 above at 235.

[45]Section 52(1) of the 1979 United Kingdom Sale of Goods Act provides: 'In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.' Ascertained goods are goods which in accordance with the agreement between the parties are identified after the contract is made. Section § 2–716 of the UCC provides that 'specific performance may be decreed if the goods are unique or in other circumstances'. This provision lays emphasis on the commercial feasibility of replacement and does not limit specific performance to goods which are specific or ascertained. The official comment to § 2–716 states: 'Output and requirement contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases.'

[46]Lando n 42 above at 236.

[47]Nicholas n 36 above at 219. Article 46(1) in providing that the buyer may require performance by the seller of his obligations, immediately provides exceptions from this general rule. When goods have been delivered that do not conform to the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract in terms of article 25 (article 46(2)), and may require the seller to repair the goods 'unless this is unreasonable, having regard to all the circumstances' (article 46(3)). On the other hand, the rule of article 62 that the seller may require the buyer to perform his obligations does not include any exceptions. Indirect exceptions applicable to both parties result from other rules of the convention. Restrictions on the buyer's duty

The right to specific relief is qualified by the provision contained in article 28, which gives a court the power to refuse a decree for specific performance if under its own law it would not render such a decree in respect of similar contracts of sale.[48] This provision, destined to preserve the position of common law jurisdictions, has nonetheless been criticised on the ground that it is unlikely that it will be applicable in practice, since given the wide discretion which common law courts enjoy in this respect, 'there are virtually no instances in which a court cannot in some circumstances order specific performance in respect of similar contracts of sale'.[49] This coincides with Lando's interpretation of the power conferred on the courts to refuse a decree for specific performance under article 28.[50] He emphasises that the court is empowered, but not bound, to reject a judgment for specific relief. After mentioning recent English case law (supporting the view that specific performance may be granted in domestic requirement contracts although the goods are neither specific nor ascertained) he concludes by saying that 'the common law courts would not be prevented from going even further in international contract cases than they have gone in domestic contract cases'.[51]

East-West

At the Vienna Conference, the socialist approach towards unification of the law of sales reflected the requirements of the former planned economies of Eastern Europe where the state enjoyed the exclusive monopoly over foreign trade.[52] In particular, the socialist view gave priority to aspects such as security of sales contracts and contractual terms, and foreseeability in

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to pay the price, for instance, may be inferred from articles 85, 86 and 88, in cases where the seller has sold goods of which the buyer failed to take delivery, and which are subject to rapid deterioration, or the presentation of which involves unreasonable expense. A similar restriction may be inferred from the seller's or the buyer's duty to mitigate the loss resulting from a breach of contract in terms of article 77.

[48]Article 28 has its antecedents in article 16 of ULIS which provided for a similar reservation. An important exception to the rule on specific performance contained in article 25 of ULIS was abandoned at the UNCITRAL deliberations. Article 25 of ULIS stated that the buyer was not entitled to require specific performance of the contract by the seller, if it would be in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract related. Article 28 CISG reads: '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.'

[49]Farnsworth n 14 above at 14.

[50]Lando n 42 above at 237.

[51]*Idem*.

[52]Socialist states achieved unification of sales law with the creation of the Council for Mutual Economic Assistance (CMEA) in 1958. Sales contracts between trade corporations of the CMEA member countries were nearly exclusively governed by the General Conditions for Delivery of Goods, which were mandatory. See V Knapp 'The function, organisation and activities of foreign trade corporations in the European socialist countries' in C Schmitthoff (ed) *The sources of the law of international trade* (1964) 67. The CMEA ceased to exist in 1991.

contract-related issues.[53]

The confrontation between socialist and Western legal systems centred on four issues: (1) whether the written form should be compulsory for the enforcement of a sales contract; (2) whether a contract is formed if the terms of the acceptance differ from the offer; (3) whether a contract exists if neither the price nor the way of quoting is specified in the contract; and (4) whether contracts should not only be performing but also be formed in good faith.[54]

Writing requirement

The formal requirement of writing has been abandoned by most Western legal systems with regard to contracts for the sale of movable goods, on the ground that it does not correspond to the conditions in which many such transactions are concluded. On the other hand, the Eastern European nations, in particular the former Soviet Union, did not admit the validity of an agreement without writing.[55] A compromise was therefore necessary on the question of formal requirements. Article 11 of the CISG states that a contract of sale need not be in writing and may be proved by any means, including witnesses.[56] The position of the socialist and other objecting states was preserved by the insertion of article 96, which permits states that require contracts to be evidenced in writing to declare article 11 inapplicable to sale contracts concluded between parties having their place of business in these states. In this case, the ordinary private international law rules of the state in question will determine the formalities for the conclusion of a valid contract.

Acceptance which deviates from the offer

In terms of the traditional 'mirror image' doctrine of contract law, an expression of intention constitutes an acceptance if it assents to the terms proposed by the offeror in his offer without variation. An attempt to add to or change the terms of the offer turns the offeree's response from an acceptance of the offer into a rejection of the offer and a counter-offer.[57] However, both the English common law and the American Uniform Commercial Code have subsequently departed from this strict view.[58] Courts have furthermore devised techniques to mitigate the harshness of the mirror rule. For example, a court might interpret the offeree's language relating to the variation of the offer as a mere suggestion which the offeror

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[53]Eörsi n 9 above at 342. See also F Enderlein 'Problems of the unification of sales law from the standpoint of socialist countries' in *Problems of Unification* n 7 above at 27.

[54]Garro n 9 above at 461.

[55]E Farnsworth 'Developing international trade law' (1979) 9 *California Western International Law Journal* 466.

[56]In terms of article 13 of the CISG the term 'writing' includes telegram and telex.

[57]E Farnsworth 'Modified acceptance' in Bianca n 3 above at 178.

[58]In terms of § 2-207(2)(b) of the UCC an additional term in the acceptance becomes part of the contract between merchants unless it materially alters the offer.

might accept or reject. In this way, the court will find an acceptance of the original offer together with a further offer by the original offeree to modify that contract.[59] But even with these mitigations, the impact of the mirror rule on the negotiations prior to the formation of the contract has caused concern in the frequent case where both parties resort to their own printed forms. In what has been labelled 'the battle of the forms', the buyer sends his printed purchase order in response to the seller's catalogue and the seller responds by sending his printed acknowledgement. Where these terms differ, problems arise as to whether a contract may actually be said to have been concluded.[60]

The convention makes a very small contribution to this problem in terms of a compromise reached in article 19.[61] Paragraph (1) of this article states the traditional mirror image rule by declaring that an acceptance which adds to or modifies the terms of the offer merely constitutes a counter offer. Paragraph 2 lays down an important exception to this general rule: where exchanged forms differ, the contract is nonetheless concluded, if the changes do not 'materially alter' the terms of the offer and the offeror does not object.

To avoid greater problems of interpretation, a third paragraph was inserted to specify which variations alter the offer materially, *ie* terms relating to price, payment, quality, place and time of delivery, the extent of one party's liability and the settlement of disputes. In this way, a compromise solution was found between the strict socialist view that an acceptance that deviates from an offer amounts to a rejection, and the more flexible view of many Western countries which considers the contract concluded in spite of minor variations.[62]

Contracts with unstated price

In some systems of law, particularly in the socialist states and in several civil law countries, the price of the goods sold must either be determined or objectively determinable at the time of the formation of the contract.[63]

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[59]Farnsworth n 57 above at 178.

[60]See A Von Mehren 'The battle of the forms' (1990) 38 *American Journal of Comparative Law* 265; U Drobnig 'Standard forms and general conditions in international trade' in C Voskuil & J Wade (eds) *Hague Zagreb essays 4: on the law of international trade* (1986) 118.

[61]Nicholas n 36 above at 217.

[62]Garro n 9 above at 463.

[63]The French Civil Code requires an agreement on price for a contract to be validly concluded, on application of a wider principle, *ie* the necessity of an object certain (*object certain*) which forms the subject-matter of the agreement (article 1108). A series of recent French court cases have drawn attention to this requirement. The French *Cour de Cassation*, for example, declared void for lack of a fixed price a clause in an agreement made by a brewery to supply beer at the price usually charged in the locality at the time of delivery. See Tallon 'The buyer's obligations under the Convention on Contracts for the International Sale of Goods' in Galston & Smit n 7 at 11. The same principles apply in Austria, Belgium, Netherlands and in the former Soviet Union; L Sevón 'Obligations of the buyer' in P Sarcevic & P Volken (eds) *International sale of goods, Dubrovnik Lectures* (1986) 208.

Socialist countries object to the conclusion of contracts with open price terms because such terms are in direct conflict with socialist emphasis on the value of security in contractual matters.[64] Civil law countries do not easily accept contracts with open price terms, particularly when the unilateral fixing of the price works to the disadvantage of the weaker party.

In addition, it was argued at the Vienna Conference that contracts without a fixed price do not serve the interests of the developing countries as a result of the unfavourable terms of trade for raw materials, as opposed to the price of manufactured goods.[65]

A more flexible system may be practicable or at least tolerable in countries or economic systems with comparatively large homogeneous and well-known market structures. The American UCC, for instance, expressly authorises contracts with open price terms.[66]

In spite of the insistence of US delegates to the convention to this effect,[67] proposals to eliminate the requirement of a fixed or determinable price failed at the Vienna Conference as a result of opposition by the Soviet Union, a number of developing countries, France and other states.[68] As a result, a compromise was reached which involves two problematic and seemingly contradictory provisions, articles 14 and 55 of the CISG.

Article 14 of the CISG (which regulates the requirements a proposal must contain to constitute a valid offer) states in paragraph 2 that 'a proposal is sufficiently definite if it indicates the goods, and expressly or impliedly fixes or makes provision for determining the quantity and the price'. A subsequent provision inserted in article 55 under the section dealing with the obligations of the buyer seems to state exactly the opposite by referring to 'a validly concluded contract' which does not 'expressly or implicitly fix or

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[64]Eörsi n 9 above at 342 comments that 'emphasis is on security without surprises — even at the expense of an otherwise desirable contract not coming into being'.

[65]Date-Bah n 7 above at 51 refers to this problem in the context of what later became article 55 of the CISG in the following terms: 'It is a well-known fact and a fact that is often deprecated by developing countries that the prices of the goods they buy and sell tend to be fixed in and by developed countries. This article is likely to exacerbate this problem. It creates the danger of sellers' prices being imposed on buyers after vague negotiations. Since sellers' prices in the case of raw materials will usually be those determined at the various commodity exchanges in the developed countries, this article will not lead to any unreasonable imposition on the buyers of raw materials in the developed countries. Rather, it is the buyer in a developing country of manufactured products of the developed countries who is likely to be landed with the idiosyncratic prices of a particular manufacturer, which may be very much above the prevailing market prices. This writer would like to see article 51 [article 55 of CISG] revised so that if there is no express or implied agreement on the price, then there is no sales contract.'

[66]UCC 2-305 provides: 'The parties if they so intend can conclude a contract for sale even though the price is not settled. In such case the price is the reasonable price at the time of delivery if nothing is said as to price.'

[67]See Farnsworth 'Formation of contracts' in Galston & Smit n 10 above at 3-8; Nicholas n 36 above at 212.

[68]Schlechtriem n 31 above at 50; also Eörsi n 24 above at 404.

make provision for determining the price'.[69]

The relationship between these two provisions is unclear. The concern of some states that a definite price term was needed is reflected in the text of article 55, which applies where a valid contract is formed. This represents, in turn, a reference to article 14 on contract formation. Because a restrictive interpretation and application of the provision contained in article 14(2) would require a definite or determinable price, a contradiction remains between the requirement of a fixed price at the conclusion of the contract (article 14), on the one hand, and the possibility of fixing the price after the contract has been concluded (article 55), on the other.[70]

Several interpretations have been attempted in order to reconcile these two provisions. Nicholas points to the fact that article 55 comes from Part III of the convention, while article 14(1) belongs to Part II. If a state has acceded to the convention in respect of Part III and not of Part II, the question whether a contract has been validly concluded will be governed by the applicable domestic law.[71] In common law jurisdictions such as England and the US, a contract without a fixed price could then be recognised as validly concluded.[72]

Honnold thinks that article 55 resolves the ambiguity of the second paragraph of article 14. In his view, article 55 makes it clear that a contract may be validly concluded if the applicable domestic law would accept open price terms.[73] He notes, in particular, that the inclusion of article 55 was based on an 'over-all compromise', *ie* a concession to the domestic laws of those states that make provision for the price an element of contract validity. He further states that the only practical consequence of this concession is that 'in making agreements with parties with places of business in states that retain the "strict" validity rule, the parties must exercise no less (and no more) care than formerly to comply with this feature of domestic law'.[74] However, other authors disagree. Farnsworth, for instance, believes that article 55 only operates if a contract has been validly concluded, and this cannot be the case, in the light of article 14, where the offer does not

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[69]Article 55 reads: 'Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.'

[70]Schlechtriem n 31 above at 81.

[71]In terms of articles 4 & 7 of the CISG, issues of validity of the contract, its terms or of any usage are subjected to the domestic law applicable by virtue of the relevant private international law rules.

[72]Nicholas n 36 above at 213.

[73]Honnold n 3 above at 412.

[74]*Idem*.

contain a reference to the price.[75]

The situation envisaged in article 55 of the CISG is unlikely to arise in large sale contracts. It is unlikely that parties to such contracts would not fix the price for the goods sold or would not, at least, devise a method for determining the price when concluding the contract, particularly if it is in writing. Furthermore, in cases where the parties have previously dealt commercially with each other, a practice between them as to the fixing of the price would be binding under article 9 of the CISG. In such cases it would not be difficult for a court to find an implied reference to a price to be determined according to previous practice.[76] Nonetheless, situations where the requirement of a fixed price might cause problems may arise where the buyer has an urgent need for the goods and the contract is concluded spontaneously without any reference to the price. In such instances, the requirement of a definite price can endanger the validity of a contract with unjust consequences, for example, by providing a pretext for escaping a disadvantageous agreement.[77]

Good faith

Article 7(1) of the CISG states, among others, that 'in the interpretation of this Convention regard is to be had to the need to promote the observance of good faith in international trade'. The inclusion in the convention of a provision creating an obligation of good faith was the occasion for an extensive debate, not only between representatives from centrally planned and free-market economies, but also between common law and civil law delegates and even among representatives who shared a common cultural and legal background.[78] Opinions ranged from the idea that good faith should be viewed as a fundamental obligation arising from the contract to the view that it should not be expressly mentioned in any provision.[79]

One of the main objections to the inclusion in the convention of a provision

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[75]Farnsworth n 67 above at 3–8. Similarly, Feltham questions whether article 14 is 'merely a statement of sufficient conditions for a sufficiently definite proposal or a statement of necessary conditions'. In the latter case a proposal which does not expressly or implicitly fix or make provision for determining the price cannot be an offer, and in this case article 55 'must be relevant only for States which ratify without adhering to Part II of the Convention'; J Feltham 'The United Nations Convention on Contracts for the International Sale of Goods' 1981 *Journal of Business Law* 351.

[76]Sevón n 63 above at 210. In terms of article 9(1) of the CISG the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

[77]Schlechtriem n 31 above at 51. Sevón considers the situation of a buyer who, immediately after ordering the goods, informs the seller that he actually does not need them, particularly where the seller has started production and incurred costs in an effort to assist the buyer. To conclude that no contract was entered into would seem equally unjust where goods have been shipped by the seller and have been received and used by the buyer.

[78]Garro n 9 above at 466.

[79]For debate on the good faith provision see Summary Records of the 5th Meeting of the First Committee, Diplom Conf (Doc C (4) OR 258) reprinted in J Honnold *Documentary history of the Uniform Law for International Sales* (1986) 478 *ff*.

imposing on the parties a general obligation to act in good faith was that this concept was considered too abstract and vague. Although good faith and fair dealing were highly desirable principles in international commerce, it was thought that their express inclusion in the provisions of the convention would inevitably lead to divergent interpretations by national courts.[80]

The wide connotations of the principle of good faith have been characterised thus:

> At the very least, good faith is an interpretative tool that precludes a party from unduly rigorous insistence on the right to terminate after a minor deviation in performance by the other. Viewed somewhat more expansively, it imports affirmative obligations on the parties to communicate during performance and to cooperate in the cure of defects and the modification of obligations in unforeseen circumstances. It precludes a perfect tender approach to interpretation of the seller's obligation of delivery and does not treat minor deviations by either side as an event that terminates the contract.[81]

In continental and socialist systems the concept corresponds to this broad approach,[82] although its application in practice may vary from country to country.[83] In particular, the notion of good faith is not limited to the performance of contracts, but extends to the process of negotiations prior to the formation of the agreement. This contrasts with the considerably more limited scope of good faith in the common law based systems, where the principle is applied to the performance of the contract, but not to its formation stage.[84]

In the course of the revision of the uniform law on formation of contracts for the international sale of goods, the Working Group of UNCITRAL adopted at its ninth session in 1978 a new provision, not contained in the ULF, in terms of which 'in the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith'.[85] The inclusion of this article generated a heated debate and a number of

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[80]Professor Farnsworth, a US delegate to the Vienna Conference, pointed out that there was some degree of uncertainty as to how the concept of good faith would be interpreted in the international context. Because of this, he felt that such a provision would be 'uncertain and dangerous'. Honnold n 79 above at 479.

[81]Rosett quoted in Garro n 9 above at 466.

[82]See, for example, the general good faith clause in paragraph 242 of the German Civil Code; Schlechtriem n 31 above at 39.

[83]In this regard, Bonell recalls 'the impressive amount of case law' developed in Germany in application of § 242 of the Civil Code, concerning such issues as *culpa in contrahendo*, abuse of rights, hardship and unconscionable contract terms, and draws a comparison with the relatively modest role which similar provisions have played in the judicial practice of other countries. M Bonell 'Interpretation of the Convention' in Bianca n 3 above at 86.

[84]The UCC provides in § 1-203 that 'every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement'. Commenting on the divergence in this regard between civil and common law systems, Professor Farnsworth (n 14 above at 19) states that 'there is no body of law in common law countries that imposes an obligation of good faith in the negotiating process before the contract is made'.

[85]Bonell n 83 above at 68.

possible solutions were put forward to resolve differences of opinion. The proposal which finally emerged as a realistic compromise solution, was to incorporate the principle of the observance of good faith into the article on the interpretation and application of the provisions of the convention.[86] This is also the solution which prevailed in article 7(1) of the CISG.

This provision, which represents a compromise between those who would have preferred a provision imposing the duty to act in good faith directly on the parties, and those who were opposed to any express reference to the principle of good faith in the convention, has been analysed by several scholars.[87] There are those who, based particularly on the legislative history of the article, interpret this provision in a narrow way. In terms of this view, good faith is strictly limited to the interpretation of the convention generally, but does not impose an additional obligation on the parties to act in good faith.[88] On the other hand, there are those who see good faith as a general principle that must be regarded in interpreting and extending the convention's provisions.[89] This viewpoint accords with the Secretariat Commentary to article 6 of the 1978 UNCITRAL Draft — which has the same meaning as article 7 of the official text — but does not follow from the legislative history of the provision, which suggests a limited reading of the role of good faith.[90] Advocates of this wide approach point to the many applications of good faith throughout the text. Kastely, for instance, observes

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[86]Eörsi n 10 above at 2–7 describes this process thus: 'The situation was aggravated by a proposal of the GRD to the effect that, of one party violates the principle of fair dealing, the other party may demand reimbursement of his costs. After lengthy discussions, a proposal of an ad hoc Working party recommended that as a compromise good faith could survive but should be shifted to the provisions on interpretation of the Convention, thus consigning it to a ghetto and giving it a honourable burial.'

[87]A Kritzer *Guide to practical applications of the UN Convention on Contracts for the International Sale of Goods* (1989) 112.

[88]Farnsworth n 14 at 19 represents this view. He comments with regard to article 7: 'It may be hoped that these familiar and seemingly harmless words may be of some use without being thought to impose on the parties in the formation of contracts a set of civil law obligations that are unknown to the common law tradition.' See also P Winship 'Commentary on Professor Kastely's rhetorical analysis' (1988) 8 *Northwestern Journal of International Law and Business* 633. The same author, however, stated in a different article that 'a persuasive case can be made, for example, that an obligation to act reasonably and in good faith is mandated by article 7(2)'; P Winship 'Private international law and the UN Sales Convention' (1988) 21 *Cornell International Law Journal* 529. The article on good faith has been labelled 'a particularly telling illustration ... of this ineffectual results of patchwork compromise [which] are apparent in some of the Convention's central provisions'; T Carbonneau & M Firestone 'Transnational law-making: assessing the impact of the Vienna Convention and the viability of arbitral adjudication' (1986) 1 *Journal of International Dispute Resolution* 74.

[89]Bonell in Bianca n 83 above at 85; A Kastely 'Unification and Community: a rhetoric analysis of the United Nations Sales Convention' (1988) 8 *Northwestern Journal of International Law and Business* 597.

[90]Winship n 88 above at 631. The Secretariat Commentary, (reprinted in Honnold n 79 at 408) after citing several provisions which reflect a duty for the parties to act in good faith, concludes by saying that: 'The principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.'

that good faith is reflected, in particular, in the commitment of the convention to honest communication between the parties and in provisions requiring the parties to act with some concern for each other's interests. A good example is the provisions on preservation of goods and the mitigation of damages.[91] The principle of good faith may also be recognised in other substantive provisions such as those dealing with the non-revocability of certain offers,[92] regarding errors in transmission,[93] performance of the contract[94] and the exercise of rights in the event of breach.[95] A variation of this viewpoint is represented by scholars who, while deploring the absence of a general clause to this effect, still maintain that good faith may play an active role in spite of its location in the convention.[96]

As has been observed by Honnold, a party who, for instance, fixes an additional period for performance by the other in terms of articles 47 or 63

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[91]Arts 85–88 of the CISG. If the buyer has wrongfully failed to take delivery or the seller has made a defective delivery, the party in possession of the goods is obligated to preserve them for the benefit of the other party (art 85). This duty may include arranging for storage or resale of the goods (storage costs and other expenses can be recovered from the breaching party) (arts 85–88). If the person in charge does resell the goods, he must account to the other party for the proceeds (art 88(3)). Article 77 provides that a party injured by the other party's breach must take reasonable steps to mitigate damages.

[92]See article 16(2) n 28 above.

[93]The recipient of an erroneously transmitted acceptance, notice of defect, or other such communication is obligated either to notify the other party of the error or to treat it as effective (arts 21(2), 27).

[94]The seller must consider the interests of the buyer when arranging for carriage and insurance (arts 32(1)& 32(2)) or when specifying the goods to be sold (art 32(3)). In exercising a right to cure a defect in the goods delivered or in the documents relating to the sale, the seller must consider any inconvenience or extra expense to the buyer (arts 34, 37, 48). Similarly, a buyer must consider the interests of the seller by promptly inspecting the goods and giving notice of any defect (arts 38, 39).

[95]In the system of remedies adopted by the convention, one party may not avoid the contract on account of the other party's breach unless the breach was fundamental *ie* so serious as to substantially deprive the former of the expected benefit of the contract (art 25). The requirement of good faith also applies in circumstances in which the right to declare a contract avoided is lost (arts 49(2), 64(2), 82.

[96]U Huber 'Der Uncitral-Entwurf eines Übereinkommens über internationale Warenkaufverträge' (1979) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 432. Schlechtriem, for instance, states (n 31 above at 39) 'The German jurist may regret this rejection of a 'good faith rule' corresponding to § 242 of the German Civil Code in its present day meaning. However, the function of such a general clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of a 'reasonable person' which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention.' Similarly, Eörsi n 10 thinks that the interpretation of the convention may lead to application of the good faith clause. He states: 'It might be argued that in such cases it was not the Convention which was interpreted but the contract. In my humble opinion, however, interpretation of the two cannot be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract.'

may not, in good faith, refuse to accept the performance he requested.[97] Similarly, a delay in compelling specific performance or in avoiding the contract after a market change constitute situations which would permit a party to speculate at the other's expense, a result that may be inconsistent with the convention's provisions on remedies construed in the light of the principle of good faith.[98] Although scholarship and judicial doctrine have still to develop a meaning for the application of 'good faith principles' to issues that arise in international trade, it is clear that the reference in the convention to the aim of promoting 'uniformity in its application' precludes the use of purely local definitions and concepts to construe an international text such as the CISG.[99]

North-South

Disparities in the economic and political structure of the countries represented at Vienna were perhaps most clearly evidenced in the confrontation between developed and developing countries.[100] According to Eörsi, the North-South debate was characterised by three main factors. First, the economic fact that the developing countries export mainly raw materials and agricultural products and import technology and finished goods; second, the awareness of their market's underdeveloped technological and legal conditions; and third, their frequently justified mistrust of developed industrial states.[101]

Some of the most problematic issues in the debate between delegates of developed and developing countries were the following: (1) when should buyers give written and specific notice of non-conformity of delivered goods and what are the consequences of failing to provide such notice; (2) under what circumstances should a party be allowed to suspend performance; and (3) whether the passing of risk of goods sold in transit should be fixed at the time of handing the goods over to the carrier or at the time of the con-

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[97]In terms of article 47, in case of non-performance, the buyer may fix an additional period of time for performance by the seller of his obligations. During this period, the buyer may not resort to any remedy for breach of contract. Article 63 contains a similar provision in case of non-performance by the buyer.

[98]Honnold n 3 above at 147.

[99]*Idem*.

[100]As Eörsi notes, the confrontation between industrialised and developing countries (or North and South) is a rough generalisation, because several South American delegations belonging to developing countries sided with their Western European colleagues, while many ex-British colonies reflected a common law approach, rather than the interests of developing countries; n 9 349. See also Farnsworth n 55 above at 465: '[T]here are the developing nations which are very numerous and not always as well represented. Although not all of them are able to send technical experts to this commission, some have found it possible to participate very actively. And while there are differences between common law and civil law countries among the developed nations, it has been somewhat surprising to me that the developing nations are primarily "developing" and only very secondarily by tradition divided into common law or civil law.'

[101]Eörsi n 9 above at 350.

clusion of the contract.[102]

Buyer's notification of non-conformity

In terms of article 38, the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. The purpose of the examination of the goods is to determine whether or not they conform to the contract. In order to preserve the buyer's remedies for non-conformity, article 39(1) requires him to give notice to the seller 'specifying the nature of the lack of conformity within a reasonable time after he discovered it or ought to have discovered it'. Read together, these articles require a buyer to examine the goods within the shortest practicable period and to give notice to the seller within a reasonable time after the buyer discovered or ought to have discovered non-conformity. The buyer's failure to give timely notice results in the loss of remedies for non-conformity.[103]

At the Vienna Conference, few substantive areas caused more debate than those concerning the consequences of the buyer's failure to notify the seller timeously of the non-conformity of the goods.[104] The debates during the 1980 diplomatic conference reveal a clear divergence between the views of those from developed and developing countries on the need to protect the seller when the buyer claims the non-conformity of the goods. Representatives from developing countries, who saw themselves as predominantly buyers of manufactured goods and sellers of primary products, would have been satisfied with a rule which required notice, but limited the sanction for inadequate notice to damages in the amount effectively suffered by the seller on account of the lack of notice. Representatives from developed countries, on the other hand, conceiving that such a rule afforded too little protection to the seller, were convinced that eliminating the buyer's right to have recourse to the full range of remedies for breach would ensure compliance with timely notice requirements.

Schlechtriem points out that an improvement in the position of buyers who fail to inspect the goods and to send notice of objections was for quite a

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[102]The discussion of the role of trade usages in international sales, which was also debated along the North-South conflict lines, has been extensively dealt with in an LLM dissertation by the present writer entitled *The role and meaning of trade usages in the 1980 United Nations Convention on Contracts for the International Sale of Goods*' (Unisa 1994 unpublished).

[103]Article 39 of the ULIS, the predecessor of article 39 of the CISG, provided that 'the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he has discovered the lack of conformity or ought to have discovered it'. When members of the United Nations General Assembly submitted their comments on the Hague Conventions, a number of countries expressed their concern with regard to this article of the ULIS. The basic objection was that the sanction for failure to notify, *ie* the loss of the right to rely on the non-conformity of the goods, was too harsh. See Hayes Patterson n 9 above at 285.

[104]Date-Bah n 7 above at 39; Eörsi n 9 above at 350 ('eight modifying texts were presented and no less than 111 interventions were made at sessions 16, 17 and 21'); Schlechtriem n 31 above at 70 ('one of the Conference's most difficult problems concerned the consequences of failing to give timely notice of non-conformity').

number of countries an absolute precondition for approving the CISG.[105] Delegates from developing countries vehemently objected to the loss of the buyer's right to rely on non-conformity as a consequence of failure to give notice, a solution seen as too harsh a punishment, especially as in the situation envisaged, it was the seller, and not the buyer, who had committed the breach of contract.[106] Moreover, it was explained that in many instances, it would simply not be possible to give notice of lack of conformity within a reasonable time. The argument was illustrated by the example of a buyer in a developing country who must rely on the opinion of a foreign expert to examine complicated machinery. In these circumstances, it was argued that the examination would take much longer than in developed countries, where expertise is normally more readily available.[107] It was also said that in many developing countries illiterate traders will often learn of the notice requirement only after they consult specialised counsel with regard to some aspect of the transaction, *eg* a breach of contract by the seller, as in some of these countries there is no similar obligation to give a written notice of such non-conformity.[108]

Conversely, other delegations stressed that the practice of short-time notice of lack of conformity was essential to settle disputes quickly and effectively. Many civil law jurisdictions, for instance, provide that the right to rely on a lack of conformity is lost by the lapse of time — whether a fixed period or a reasonable time — from either delivery or from the moment when the buyer discovered or should have discovered the lack of conformity.[109] Some representatives were particularly concerned with the seller's need to obtain evidence and to ascertain the validity of the buyer's claim. To allow an extended period of time for notification of non-conformity would create difficulty and uncertainty in this regard, particularly in the event of re-sale.[110]

After much debate, a compromise solution was reached, which retained the presumption in favour of the seller's right to receive timely notice but permitted limited recovery for the buyer with a reasonable excuse for failure to give such notice.

The basic rule is that the buyer must examine the goods as soon as is practicable and he loses his right to rely on the lack of conformity if he does

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[105]Schlechtriem *idem* 71.

[106]*Idem* at 48.

[107]Date-Bah n 7 above at 49.

[108]*Idem*. The author stressed that 'this is not a problem peculiar to Ghana and that traders in many other developing countries may default in giving written notice within the prescribed time limit'.

[109]The delegate from Austria, for instance, stated that under Austrian law, the time limit for a buyer to give notice of non-conformity was eight days. After stressing that experience gained in court practice in Austria and other countries with similar rules pointed to the adequateness of such a provision, he emphasised that the two-year limit of the draft already represented a compromise for his country. See Honnold n 79 above at 543.

[110]*Idem*.

not give notice of it to the seller (1) within a reasonable time after he discovered it or ought to have done so; or (2) in any case, within two years of the actual handing over of the goods (article 39). The assessment of what constitutes a 'reasonable time' will depend on the nature of the transaction and, to a great extent, on the buyer's particular circumstances.[111] Apart from this, the buyer is allowed by article 44 — but always subject to the limit of two years — to have recourse to the remedies of reduction of price or damages (except for loss of profit) if 'he has a reasonable excuse for his failure to give notice'.[112]

The basic rule that the buyer must examine the goods as soon as is practicable in the circumstances receives some elaboration for the normal case where the contract involves carriage of the goods and also where 'the goods are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination by him'. In terms of article 38, in the first case, the examination may be deferred until after the goods have arrived at the new destination. The same solution applies in the second case, provided that 'at the time of conclusion of the contract the seller knew or ought to have known of the possibility of such redistribution or dispatch'. Although not expressly stipulated, this provision will probably be interpreted to include the case where the redirection or re-dispatch is due to re-sale by the buyer.[113]

Suspension of performance

Article 71 of the CISG provides for cases where, while it is not clear that one party will commit a fundamental breach of contract (so as to justify avoidance for anticipatory breach),[114] nevertheless the other party has good reason to fear that the first party will be unable to perform. In this

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[111]Hayes Patterson discusses German case law concerning equivalent provisions contained in the ULIS and states that 'in measuring the time within which notice should be given, courts will consider the nature of the goods, requiring more swift action where the goods are perishable'. A reference to the surrounding circumstances 'accords with the present article's legislative history' n 9 above at 299.

[112]Nicholas n 36 above at 222. To take advantage of this concession the buyer must be able to show that although he knew, or should have known, of the lack of conformity, he nevertheless had a reasonable excuse for not giving notice. Professor Date-Bah is of the opinion that the two-year limit is too short to cover adequately, *eg* sales of complex machinery in which latent defects may show up well after the two years have lapsed. Accordingly, he advises such buyers either to obtain a guarantee which will override the two-year limitation period or simply derogate from the rule laid down in article 39(2). Professor Farnsworth recommends that sellers do likewise, but in order to reduce — not expand — the two-year period; Garro n 9 above at 472.

[113]Nicholas bases this conclusion on 'the elaboration of modern packaging, particularly of high-technology products, and the widespread use of containers [which] will make it easy for the buyer to show that there was no reasonable opportunity for examination by him'; n 36 above at 223.

[114]In terms of article 72, if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. To this effect, an express repudiation by the defaulting party is not necessary; it is sufficient that in the circumstances, it is 'clear' that he will default. Nicholas *idem* 232.

case the other party may suspend performance, or stop the goods in transit. He must resume performance if the other party 'provides adequate assurance of his performance'.[115]

There was an unusually lengthy and controversial discussion of article 71 at the diplomatic conference. Article 62(1)of the 1978 Draft Convention in authorised suspension of performance by a party who had 'good grounds to conclude that the other party will not perform a substantial part of his obligations'. Representatives of developing and other countries were particularly concerned that this rule could be abused to the detriment of contractual partners from less developed countries, since it was felt that the proposed rule allowed too great a latitude of subjective assessment of the other party's ability to perform.[116] Accordingly, they proposed to limit suspension of performance to situations where difficulties arose beyond doubt, *eg* where the other party went bankrupt.[117] Delegates from developed countries, in contrast, sought to reduce the risk of performance and argued that the mere probability of trouble should suffice.[118]

An ***ad hoc*** working group of representatives from ten countries was established to find a suitable solution. A revised text developed by this group led to the present formulation of article 71 of the convention.[119] This article represents a compromise in terms of which the test for suspension

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[115]Article 71 reads: '(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:(a)a serious deficiency in his ability to perform or in his creditworthiness; or (b)his conduct in preparing to perform or in performing the contract.(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.'

[116]Schlechtriem n 31 above at 93. See also the statement made by the representative of Egypt, Mr Shafik, in the sense that 'it [is] extremely dangerous to empower the parties to withdraw from their obligations solely on the basis of such a purely subjective assessment of the situation and without any supervision by the courts'; Honnold n 79 above at 640–641.

[117]Fears that this provision could operate too harshly against smaller businesses with limited credit backing are reflected in the following statement from the delegate from Ghana, Professor Date-Bah (quoted in Garro n 9 above at 474): 'Providing such an assurance [for performance; article 71(3)] will often involve bank services produced at a fee. The cumulative effect of suspensions by several sellers may in fact, therefore, represent such an increased cost of trading for the financially weaker buyer as to drive it under. Thus the exercise of art 71 by several of a buyer's sellers may constitute a self-fulfilling prophecy, since by their joint action they may succeed in bankrupting a marginally solvent buyer. Thus a buyer who is in fact solvent but appears to several of his buyers to be insolvent can be rendered insolvent through the action permitted by art 71 to his sellers, unless he is operating with a large margin of solvency. This loads the dice against small business units which trade internationally.'

[118]Eörsi n 9 above at 351.

[119]Honnold (commentary) n 3 above at 487. See n 115 above.

did not become entirely objective, not being restricted to bankruptcy of the other party. On the other hand, it became less subjective than in the UNCITRAL text, by replacing the words 'gives good grounds to conclude' by 'it becomes apparent' that the other party will not perform.[120] Under this rule, a party may suspend performance even when the inability to perform already existed before the conclusion of the contract, as long as it 'becomes apparent' only afterwards according to objective grounds showing a substantial probability of non-performance.[121]

Passing of risk in transit

The practical importance of the passing of risk in a sales transaction is such that it will usually be regulated by the contract, either expressly or by the use of trade terms such as Incoterms.[122] In the absence of such regulation, articles 67 to 69 dealing with the passing of risk will apply.

The approach of the CISG to risk of loss differs markedly from that of its predecessor ULIS. Under the Hague Uniform Law, risk passed to the buyer when the seller had discharged his main obligation through the 'delivery of goods effected in accordance with the provisions of the contract and the present Law'.[123] This formula of linking the passage of risk to delivery was criticised for being too abstract and impractical.[124]

The CISG regulates risk of loss independently from the treatment of the seller's obligation to deliver. It contains a primary rule for cases in which the

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[120]Eörsi n 351; but see Ziegel ('the new test is supposed to inject a higher degree of objectivity; I am not convinced it does') who notes that the right to suspend performance under article 71 of the CISG is much broader than the right obtaining under German law (BGB § 321 'significant deterioration in the financial position of the other party') or under the British Sale of Goods Act (41(1)(c) 'unpaid seller's right to retain goods limited to cases where the buyer becomes insolvent') but no broader than the right provided for in the Uniform Commercial Code (UCC 2-609(1) 'when reasonable grounds for insecurity arise').

[121]Schlechtriem n 31 above at 92 notes that this interpretation corresponds to the aim of the proposal that led to the final wording of the article.

[122]International Chamber of Commerce, Rules for the Interpretation of Trade Terms (ICC Publication No 460, Incoterms 1990). The word 'risk' is used to refer to the incidence of the loss resulting from any casualty to the goods which is not due to an act or omission of the other party. Article 66 of the CISG recognises the principle of the passing of risk by providing that 'loss or damage to the goods after the risk has passed from the seller to the buyer does not discharge him from his obligation to pay the price'. See B Von Hoffman 'Passing of risk in international sales of goods' in Sarcevic n 63 above at 266 *ff*.

[123]Article 97(1) ULIS. The technical concept of 'delivery' is defined in article 19(1) of the ULIS as 'the handing over of goods which conform to the contract'.

[124]Von Hoffmann mentions two practical objections against the use of delivery as the critical factor for the passing of risk. Under the ULIS, the concept of 'delivery' implies that all contractual obligations of the seller have been complied with. A seller who hands over defective goods to the buyer has not met his contractual obligations and has, therefore, not 'delivered'. In this situation, the risk remained under the ULIS regime with the seller, although it was the buyer who had possession of the goods. The second objection relates to the silence of the ULIS with regard to the connection between risk of loss and the handing over of transport documents such as the bill of lading n 122 above at 276.

sale involves transport of the goods, a special rule for goods sold while in transit, and a residual rule for other cases.[125]

The provision regulating the passing of risk for goods sold in transit was the subject of considerable controversy.[126] Article 80 of the UNCITRAL Draft, based on trade practice widely followed in Europe and in accordance with the position adopted by article 99 of ULIS,[127] stated that the risk of loss or damage to goods sold in transit passed retroactively from the time when the goods were handed over to the carrier, and not from the time of the conclusion of the sale agreement. Delegates from developing countries took the position that article 80 of the Draft was unreasonable in that the risk was assumed by the buyer retroactively. It was thought that such a solution might disadvantage sellers of raw materials and other bulk goods from developing countries, since these kinds of product are usually sold in transit.[128] It was also suggested that the buyer could have no insurable interest until that moment, and that it was unacceptable for the buyer to assume the risk in respect of goods which had not been insured prior to the conclusion of the contract.[129]

The arguments in favour of retroactive passing of risk were that it represented the usual practice in international trade and was essentially a matter of trading and insurance techniques.[130] It was also argued that any additional risk borne by the buyer would cause an increase in the price and, in particular, that if the risk were to pass from the moment when the contract was concluded and the goods were damaged while in transit, it would be impossible or very difficult to establish exactly when the damage

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[125]Article 67 deals with cases in which the 'contract of sale involves carriage of the goods' *ie* the contract requires or authorises the seller to arrange for the goods to be carried and the carriage is done by a third party. In such cases, if the seller is not bound to hand over the goods at a particular place, the risk passes 'when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale'. If the seller is bound to hand over the goods to a carrier at a particular place (for instance in the case of a FOB, CIF or FAS sale) the risk does not pass to the buyer until the goods are handed over to the carrier at that place, *ie* the port of shipment; Von Hoffman n 122 above at 288 ('the physical handover to the sea carrier is decisive'). If the contract of sale involves carriage, but requires the seller to cause the goods to be handed over to the *buyer* at a particular place, the matter is governed by the residual rule of article 69 and the risk will pass when the buyer takes over the goods; Nicholas n 36 above at 238.

[126]B Nicholas 'Passing of risk' in Bianca n 3 above at 496.

[127]Von Hoffman n 122 above at 293.

[128]As Enderlein points out, it is not clear from this argument why the opposite rule (passing of risk from the moment of conclusion of the contract) should be particularly in the interest of the developing countries; n 3 above at 270. What was probably intended, was a reference to re-sellers, *ie* middlemen who were originally affected as buyers from developing countries; Schlechtriem n 31 above at 89.

[129]Honnold 'Risk of loss' in Galston-Smit n 10 above at 8–12; Eörsi n 9 above at 352. See also Honnold n 79 above at 624 *ff*.

[130]Schlechtriem points out that in usual contracts such as CIF transactions, the risk that the buyer would have to pay for goods that were already damaged or lost at the time the sales contract was concluded is normally covered by insurance n 31 above at 89.

occurred.[131]

Article 68 of the CISG is a compromise response to help allay the concerns of the developing countries. The first sentence of the article lays down the primary rule that the buyer bears the risk from the moment the contract is made, *ie* while the goods are in transit. The second sentence, however, provides for the risk to pass retroactively from the moment the goods are handed over to the carrier 'if the circumstances so indicate'.[132]

The provision has been criticised as being 'only a formal compromise' which in practice 'will probably lead to a failure of the uniform law since the judge has the power to choose the main rule or the exception at his whim'.[133] Problems of interpretation may arise as to what is covered by 'if the circumstances so indicate',[134] although it is normally understood that the retroactive effect of the passing of the risk will apply where an agreement to that effect can be implied. The existence of transportation insurance, for example, would constitute such an instance.[135] It has been pointed out that the issue might be purely academic, since contracts for the sale of goods in transit customarily include a provision requiring the seller to transfer an insurance policy to the buyer, or are, alternatively, subjected to customary trade terms which would supersede the provisions of the convention.[136] Nevertheless, by disguising an irreconcilable position behind an illusory compromise, the CISG failed on this point to provide an adequate solution to fill the gaps left by the parties.[137]

CONCLUSION

The many compromise solutions in the final text of the CISG and the vigorous debates that preceded their adoption evidence the technical and cultural obstacles faced by connection with the several issues presented by the law of sales. The objective of the drafters of this convention was to devise provisions that would accommodate these conflicting national rules and traditions. In so doing, negotiators often declined to reconcile conflicts over fundamental principles. Instead, they sought to compromise on

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[131]Nicholas n 126 above at 496. Honnold comments that 'the problem is less serious when damage results from an identifiable event such as fire, a storm at sea or a truck collision, but it is difficult when damage results from water seepage, overheating or the like' n 3 above at 468.

[132]Article 68 of the CISG states: 'The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.'

[133]Eörsi n 9 above at 352.

[134]Nicholas n 36 above at 239.

[135]Enderlein n 3 above at 271; Schlechtriem n 31 above at 90; Nicholas n 36 above at 239.

[136]Enderlein *idem*.

[137]Garro n 9 above at 476; Eörsi n 9 above at 352.

linguistic formulations which would accommodate different points of view.[138]

Critics of the convention have questioned the CISG's usefulness as a vehicle for unification due to its frequently 'uneasy' compromises that avoid substantive issues by failing to deal with them.[139] Conversely, other scholars prefer to characterise the uniform law as 'a triumph of cooperative international work',[140] a 'modern law that will serve its practical purpose'[141] and 'the most advanced solution achievable under the present circumstances'.[142]

It is thought that a fair assessment of an international unification effort such as the Vienna Convention must choose as a point of reference not an ideal model, but the pre-existing situation of fact and law. Viewed in this light, the uniform law represents an important step toward a more secure and balanced regulation of international sales contracts. Elaborated under the auspices of UNCITRAL, the CISG offers the necessary guarantee of impartiality. It is equally accessible to most economic operators, in that it is edited in six official languages. Most importantly, however, it represents an improvement with regard to most domestic laws, by regulating in a single document the formation and interpretation of the sales contract and the rights and obligations of the parties to it. Of course, if the laudable ideals of an international sales law such as the CISG are to be realised, much will depend, in practice, upon the good offices of those called upon to interpret the convention who, aware of the many gaps and shortcomings which are found in its text, must work together to ensure uniformity of application. An essential requirement for this purpose, particularly in countries like South Africa who might consider ratifying the convention, is a wider knowledge, not only of the text itself, but also of the way in which it is interpreted and applied in other countries who have participated more actively in the preparation of the uniform law.

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[138]Note 'Unification and certainty: the United Nations Convention on Contracts for the International Sale of Goods' (1984) 97 *Harvard Law Review* 1988.

[139]Carbonneau & Firestone (n 88 above at 79), for instance, have criticised the deference to domestic law which results from lack of consensus on many issues. They state: 'The Vienna Convention, rooted in national law considerations seeking to preserve the prerogatives of sovereignty in a competitive political environment, is an inappropriate instrument by which to accomplish the task [of elaborating a revitalised law merchant]. The text of the convention is riddled with instances of parochial political compromise and accompanying substantive ambiguities that only can undo the fabric of international commerce, which continues to be estranged from the realm of politics and diplomacy.' See also A Rosett 'The International Sales Convention: a dissenting view' (1984) 18 *The International Lawyer* 445.

[140]Statement by Honnold, quoted in Hayes Patterson n 9 above at 283 n 98.

[141]Schlechtriem n 31 above at 115.

[142]Bonell 'Introduction to the Convention' in Bianca n 3 above at 12.