The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles

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I. U.S. Ratification of the International Sales Law

If an American sells widgets to an Italian, which law governs the sale—U.S., Italian, or some other law? Soon the answer to this question could be the new international law of sales. On October 9, 1986,[1] the U.S. Senate ratified the 1980 United Nations Convention on Contracts for the International Sale of Goods (the Convention).[2] Along with China and Italy, the United States deposited its ratification with the Secretary-General of the United Nations (U.N.)[3] on December 11, 1987, becoming the ninth, tenth, and eleventh country to sanction the Convention.[4] On January 1, 1988,[5] twelve full months

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[1] *Senate Approves Vienna Convention on Sale of Goods*, 3 Int'l Trade Rep. (BNA) 1293 (Oct. 22, 1986). Vote was 98 to 0. *Id.*

[2] The Convention was unanimously approved by a diplomatic conference of sixty-two states in Vienna on April 11, 1980, U.N. Doc. A/Conf. 97/18, *reprinted in* 19 I.L.M. 668 (1980). Text appears in several publications, *e.g.*, J. HONNOLD, UNIFORM LAW OF INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, app. A (1982).

[3] Art. 89. ("The Secretary-General of the United Nations is hereby designated as the depository for this Convention.").

[4] States which have ratified the Convention include Argentina (July 19, 1983), China (Dec. 11, 1986), Egypt (Dec. 6, 1982), France (Aug. 6, 1982), Hungary (June 16, 1983), Italy (Dec. 11, 1986), Lesotho (June 18, 1981), Syrian Arab Republic (Oct. 19, 1982), Yugoslavia (March 27, 1985), and Zambia (June 2, 1986). States which signed or acceded (i.e. signed after expiration of the official sign-up period), but not ratified include: Austria (April 11, 1980), Chile (Sept. 30, 1981), Czechoslovakia (Sept. 1, 1981), Denmark (May 26, 1981), Finland (May 26, 1981), German Democratic Republic (Aug. 13, 1981), Federal Republic of Germany (May 26, 1981), Ghana (April 11, 1980), The Netherlands (May 29, 1981), Norway (May 26, 1981), Poland (Sept. 28, 1981), Singapore (April 11, 1980), Sweden (May 26, 1981), United States (Dec. 11, 1986), Venezuela (Sept. 28, 1981). Countries expected to adopt the Convention in the near future: Australia, Austria, Canada, Czechoslovakia, India, England, Mexico, The Netherlands, and Switzerland. In five years 30 to 40 states are expected to join. Information available from: Mr. Max Levy, Treaty Section of Legal Affairs, Room S-3200, United Nations, New York, New York 10017, Tel. (212) 963-1234.

[5] Art. 99(1). "This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession." *Id.*

after adoption by ten countries, the Convention becomes effective. Treaty law will thus impact sales law, an area normally left to countries or states.[6]

II. Purpose and Scope

What are the advantages of an international law on sales? Could the parties simply apply domestic law to their transactions? As no one cares to surrender to foreign legal systems, international traders must sometimes defer to foreign law. The Convention seeks to protect against the vagaries of such foreign law which must be identified, understood, and proven in court. By unifying and codifying an international law of sales, the Convention gives international traders a ready-made fall back position when disagreeing on the applicable law.

After setting forth the scope of its application,[7] the Convention contains detailed rules on the formation of contracts[8] and the obligations of sellers[9] and buyers.[10] It further contains specific provisions on fundamental breach,[11] avoidance,[12] error in communications,[13] specific performance,[14] writing requirements,[15] and passing of risk.[16] Final provisions deal with ministerial matters and reservations.[17] In toto, the Convention consists of 4 Parts and 101 Articles,[18] all geared to be of practical help to sellers and buyers in different countries by reducing legal pitfalls.[19]

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[6] Sales law in the United States is typically within the domain of the state. An overriding treaty is highly unusual. It is the first time the treaty power has been used to enact private as opposed to public law. *See International Sale of Goods: Hearings on Treaty Doc. 98-9, Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 36 (1984), (statement of Frank A. Orban III, International Counsel, Armstrong World Industries, Inc.) [hereinafter *Senate Hearings*].

[7] Arts. 1-13.

[8] Arts. 14-24.

[9] Arts. 30-52.

[10] Arts. 53-65. Arts. 71-84 contain provisions common for seller and buyer.

[11] Art. 25.

[12] Art. 26.

[13] Art. 27.

[14] Art. 28.

[15] Art. 29.

[16] Arts. 66-70.

[17] Arts. 89-101.

[18] Part I. Sphere of Application and General Provisions (arts. 1-13); Part II. Formation of Contract (arts. 14-24); Part III. Sale of Goods (arts. 25-88); Part IV. Final Provisions (arts. 89-101).

[19] Much has already been written on the Convention. The standard work is by J. HONNOLD, *supra* note 1 (Prof. Honnold is preparing a new treatise on the Convention). *See also Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979). For a list of publications up to Oct. 1, 1983, see Winship, *Bibliography: International Sales of Goods*, 18 INT'L LAW. 53 (1984).

III. Basic Principles

The leading course through the drafting years was to create an acceptable, workable law, stressing the Convention's international character. Rather than supplanting domestic law, the Convention implements it in the international arena, and then, only if the countries of both parties have ratified. The Convention thus applies only to contracts of sale of goods between parties whose places of business are in different countries, both of which have adopted the Convention.[20] Such countries share a common interest in international trade as manifested by formal ratification of the Convention.

To encourage large-scale adoption, the Convention does not encompass subjects considered too controversial for agreement. Liability for defective products, for example, varies in different countries. Some have a developed system of product liability law, others do not. The Convention thus limits itself to commercial transactions. It does not apply to consumer sales[21] or affect liability for death or personal injuries.[22] Questions regarding the validity of a contract, such as fraud, illegality, duress, and unconscionability are also left to domestic law.[23] Excluded further are third party problems, a subject which was believed too controversial for resolution under this Convention.[24]

In dealing with interpretation, the Convention seeks to prevent any one domestic law from becoming dominant, since this would discourage worldwide adoption. Interpretation must respond to the international character, promote uniformity, take account of custom and usages, and observe good faith.[25] If the meaning is still unclear,

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[20] Art. 1(1)(a). In the event of more places of business, the one with the "closest relationship" to the contract applies (art. 10(a)); and when no place is identified the "habitual residence" applies (art. 10(b)). According to art. 1(1)(b) the Convention applies also "when the rules of private international law lead to the application of the law of a Contracting State." Art. 95 permits states to declare this article inapplicable. Because of the uncertainty surrounding private international law and the likelihood that foreign law would frequently replace domestic law, the United States ratified subject to the art. 95 reservation, thus excluding art. 1(1)(b). *See* Appendix B of the Legal Analysis, *reprinted in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (N. Galston & H. Smit ed. 1984) app. 1-27 [hereinafter INTERNATIONAL SALES].

[21] Art. 2. "The Convention does not apply to sales (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use." *Id.*

[22] Art. 5. "This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person." *Id.*

[23] Art. 4. "This Convention . . . is not concerned with: (a) the validity of the contract . . .; (b) the effect which the contract may have on the property in the goods sold." *Id.*

[24] Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21, 24 (1984).

[25] Art. 7(1). "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." *Id.*

recourse must be made to the general principles of the Convention or to "the law applicable by virtue of the rules of private international law."[26] The Convention also emphasizes custom and usage in the interpretation as well as elsewhere.[27] This feature ensures flexibility and further growth of the law and promotes worldwide acceptance.[28]

The Convention also seeks to save the contract from technical and trivial attacks. International transportation costs complicate remedies (nonacceptance and revocation) for nonconforming goods. Avoidance of the contract, therefore, is allowed only in "fundamental" breaches.[29] The Convention also gives the breaching party broad powers to cure.[30]

To prevent problems of translation and interpretation the Convention's language is terse and clear, and its concepts are uncomplicated. The obligations of the buyer and seller mirror one another. They are built on the expectations of the parties and applicable trade customs. Further, the remedies for failure to perform do not depend on how the breach is classified or its seriousness. The Convention rejects a more cumbersome approach of separate remedies for different types of breach.[31]

Most importantly, parties may opt out of the Convention or vary the effect of any of its provisions. Founded on the principle of freedom of contract law, the right to opt out was considered essential for acceptance, effectiveness, and growth of the Convention.[32]

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[26] Art. 7(2). "Questions concerning matters governed by this Convention which are not expressly settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." *Id.* For a discussion of Art. 7, See Eörsi, *General Provisions* in INTERNATIONAL SALES, *supra* note 20, §§ 2.03-.04.

[27] *See* art. 9 (binding the parties to any usage to which they have agreed and, unless otherwise agreed, to any usage which "they have impliedly made applicable to their contract or its formation . . . of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned").

[28] *See* Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619, 665 (1984) (concluding that "If the Convention as a whole reflects overall efficiency of trade usage provisions, ratification would assist merchants in maximizing their return from international transactions").

[29] Art. 25 calls a breach fundamental "if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." This is opposed to U.C.C. § 2-601 (1978) which obligates the seller to make "perfect tender". *But see also* U.C.C. § 2-608 (limiting a buyer's right to revoke accepted nonconforming goods only upon a showing of "substantial" impairment). For a discussion see Clausson, *Avoidance in Nonpayment Situations and Fundamental Breach Under the 1980 U.N. Convention on Contracts for the Sale of Goods*, 6 N.Y.L.S. J. INT'L & COMP. L. 93 (1984).

[30] *See* arts. 34, 37, and 48. *Cf.* U.C.C. § 2-508 (also liberally allowing cure).

[31] *See* J. HONNOLD, *supra* note 1, at 26.

[32] Art. 6. "The parties may exclude the application of the Convention or . . . derogate from or vary the effect of any of its provisions." *Id.* Unlike the U.C.C. which disallows

IV. The Convention's Genesis and Driving Force: UNCITRAL

The Convention is a milestone for the U.N. Commission on International Trade Law (UNCITRAL), which was established by the United Nations General Assembly in 1966 to unify and harmonize international trade law.[33] UNCITRAL's first undertaking was the drafting of an international law of sales.[34] Work on such a law had already begun in 1930 by the International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT is a committee of largely well-known European commercial lawyers established by the League of Nations in Rome in 1923.[35] Their work formed the basis for the Conventions on Uniform Rules on Formation (ULF)[36] and on the Obligations of International Sales Contracts (ULIS).[37] Both Conventions were finalized by the Hague Convention on International Law in 1964.[38] Although these Conventions went into effect in 1972 by the minimal ratification of five states, they were never truly accepted.[39] Draftsmen were predominantly West-European (the United States joined at the last minute) and outsiders saw no reason to adopt a Convention in which they had no hand in establishing.[40]

Due to its worldwide support as a U.N. body, UNCITRAL opened the road to broad participation. It has thirty-six rotating members allocated among the regions of the world. For example, Africa sends nine representatives, Asia seven, Eastern Europe five,

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unlimited disclaimer of warranties (U.C.C. §§ 2-316, 2-719) or "unconscionable" contract clauses (U.C.C. § 2-302), freedom of contract under the Convention is without exemptions.

[33] G.A. Res. 2205 (XXI), 272 U.N. GAOR Supp. (No. 16) at 99, U.N. Doc. A/6316 (1966).

[34] In addition to the 1980 Convention on the International Sale of Goods, UNCITRAL's work includes: *The New York 1974 Convention on the Limitation Period in the International Sale of Goods*, amended in 1980 to align it with the 1980 Sales Convention (U.N. Doc. A/Conf. 63/15 1974); *1978 Convention on the Carriage of Goods by Sea* (Hamburg Rules) (U.N. Doc. A/Conf. 89/13, Annex I); *1976 UNCITRAL Arbitration Rules* 31 U.N. GAOR Supp. No. 17 U.N. Doc. A/31/17 (1976); *1985 UNCITRAL Model Law on International Commercial Arbitration*, G.A. Res. 40/72, 40 U.N. GAOR Supp. (No. 17), U.N. Doc. A/40/17 (1985). *See* Fleischhauer, *UNCITRAL Model Law on International Commercial Arbitration*, 41 THE ARB. J. 17 (1986). Work in process deals with negotiable instruments, electronic fund transfers, construction of large industrial works, and countertrade. *Id.*

[35] *See, e.g.*, Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17 (1984).

[36] 834 U.N.T.S. 169, 185, *reprinted in* 3 INT'L LEGAL MATERIALS 864 (1964).

[37] 834 U.N.T.S. 109, 123, *reprinted in* 3 INT'L LEGAL MATERIALS 855 (1964).

[38] Statute of the Hague Conference on Private International Law, July 15, 1955, 15 U. S. T. 2228, T. I. A. S. No. 5710, 220 U.N.T.S. 123. The first Hague Conference convened in 1893. *See generally*, Droz & Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 Nw. J. INT'L L. & BUS. 155, 157 n.6 (1981).

[39] Of the few adhering states, the UK conditioned ratification upon actual election of the Convention by the contract parties, an event still to occur. *See* Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L. J. 461, 463 (1986).

[40] Professors John Honnold and Soia Mentschikoff represented the United States during the final months of negotiation, which was too late to accomplish major changes. *See* Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29, 30 (1984).

Latin America six, and Western Europe, Australia, Canada and the United States are jointly permitted nine.[41] The full commission meets once a year for sessions of two to four weeks in New York or Vienna. Working groups, reflecting cross sections of the commission's worldwide representation, study the subjects for the meetings in advance. Its Secretariat is a full-time body composed of an international team of professionals (mostly lawyers) with offices in U.N. City in Vienna. The Secretariat chairs and prepares the annual meetings in close cooperation with the full commission and working groups, as well as with other interested parties.[42]

V. The East Bloc Perspective

East Bloc countries have been generally supportive of UNCITRAL's work. Hungary had been instrumental in creating UNCITRAL, and together with Bulgaria and Yugoslavia (among others) participated in drafting the Sales Convention.[43] The main function of contracts in socialist countries is to help the state fulfill its national plans. Contract law in socialist countries is therefore characterized by general principles. Contracting parties are under state direction. They work, ultimately, not for their own gain, but for and on behalf of the state. Employees violating this "contractual discipline" are subject to fines and punishment.[44] An overriding consideration is the principle of "socialist cooperation." Parties in socialist countries deal not at arm's length, but owe each other a duty to obtain mutually satisfactory results.[45] Achievement of these principles is helped by standardization of contract terms, which is exactly what the Convention offers.[46]

Standardization of contract terms within the Soviet bloc had al-

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[41] *See, e.g.*, Honnold, *Uncitral's First Decade—The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979).

[42] The Secretariat enjoys an excellent reputation, for which the groundwork was laid by John Honnold, the Secretariat's first chairman from 1969-1975. *See Theberge Prize for Private International Law Recipient: John O. Honnold*, 20 INT'L LAW. 633 (1986). *See also* several dedications to Professor Honnold by his alma mater, the University of Pennsylvania: Bruton, *Dedication: John Honnold: A Personal Tribute*, 132 U. PA. L. REV. 935 (1984); Reitz, *Dedication: John Honnold as Teacher*, 132 U. PA. L. REV. 939 (1984); Pfund, *Dedication: John O. Honnold*, 132 U. PA. L. REV. 941 (1984); Graf, *Dedication: John O. Honnold and the Vienna Convention on the International Sale of Goods*, 132 U. PA. L. REV. 943 (1984); Sono, *Dedication, John O. Honnold*, 132 U. PA. L. REV. 947 (1984).

[43] *See* Honnold, *supra* note 41, at 225 n.12. *See also* article by the Hungarian representative Eörsi, *Unifying the Law (A Play in One Act With a Song)*, 25 AM. J. COMP. L. 658 (1977).

[44] *See generally* Note, *Unraveling an Enigma: An Introduction to Soviet Law and the Soviet Legal System*, 19 GEO. WASH. J. INT'L L. & ECON. 18 (1985).

[45] *See* Eörsi, *Contract in the Socialist Economy*, in VII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 30 (1978).

[46] *See also* Enderlein, *Problems of the Unification of Sales Law from the Standpoint of the Socialist Countries*, in 7 DIGEST OF COMMERCIAL LAWS 26 (March 1980). Socialist countries differentiate sales not by kind of goods, value, quality, or price but by parties, namely, (1) citizens, (2) enterprises, (3) intersocialist, or (4) intersystemary (between socialist and capitalist parties).

ready been established by the Comecon countries[47] in 1958.[48] Basically, the Comecon rules apply to all contracts of sale between Comecon members without exception. Like the Convention, the Comecon General Rules cover formation of contract, obligations of sellers and buyers, breach, remedies, and force majeure. But unlike the Convention, the Comecon Rules are longer, more detailed, formalistic, and mechanical. Also, as befitting the Socialist system, parties may not deviate from the rules, since this would jeopardize uniformity. And to ensure performance of the contract and thus fulfillment of the national plans, buyers are rarely permitted to reject goods. Further, instead of the time-consuming system of proving damages, the Rules provide for fixed penalties.[49] Despite differences, the Convention offers advantages similar to those of the Comecon Rules. It protects parties against unknown foreign laws, reduces the time of negotiation, and aids the parties in seeking amicable, fair resolutions of their disputes. Understandably, Comecon expressed general support for the Convention in March of 1983.[50] Thus, with time, most East bloc countries may be expected to ratify the Convention.

VI. The Third World Perspective

Developing countries will also benefit from a uniform sales law. In one swipe it changes old, colonially inspired rules (which developing countries generally abhor) while serving as a buffer against unwanted foreign law. It provides these countries with a ready-made legal framework for contracts, which otherwise would take too long to develop.[51] A uniform law will also benefit individual businessmen. The Convention takes on the role of a lawyer, who otherwise may not be available. Thus, since the Convention originated with the U.N., a body generally perceived as promoting third world inter-

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[47] Comecon, in full the Council for Mutual Economic Assistance, was formed in 1949 as the east bloc counterpart to the West-European countries which became united by the Marshall Plan. Its members consist of the Soviet Union and its satellite states (Albania has not participated since 1961), as well as Mongolia (admitted 1962), Cuba (admitted 1972), and Vietnam (admitted 1978). The role of the latter three states is minor. Other communistic countries, such as Yugoslavia (which separated from the Soviets in 1948), China, North Korea, Cambodia, and Laos are not members. *See* T. HOYA, EAST-WEST TRADE, COMECON LAW, AMERICAN-SOVIET TRADE 4 (1984).

[48] The Comecon General Conditions were adopted in 1958, amended in 1964, revised and enlarged in 1968, 1975, and 1979. *See id.* at 97.

[49] *See id.* at 98.

[50] *See Vienna Convention for Sale of Goods Gets Strong Backing*, 19 Int'l Trade Rep., U.S. Export Weekly (BNA) No. 17, at 728, 29 (Aug. 16, 1983).

[51] *See* Graf, *supra* note 41, at 945. "Like its counterpart in other Latin American countries, the Mexican Commercial Code is old and inadequate. It was originally copied from texts elaborated in the nineteenth century that were not drafted or conceived for international transactions."

ests, developing countries have responded positively.[52]

VII. Sensitive Issues

Despite a general consensus on the Convention's goals, countries disagreed on specific issues. East, West, North, and South each had their own hobbyhorses, of which they could not or would not let go.[53]

A. Sensitive Issues with East Bloc Countries

East and West confronted each other on four points: (1) the need for a writing; (2) the use of usages; (3) the continuation of the mirror-image rule; and (4) the utility of open price terms.[54]

For state-operated societies, certainty, foreseeability, and lack of surprises are deemed essential. Therefore, written proof of contracts is of the essence in socialist countries.[55] Nevertheless, article 11 of the Convention states that a contract of sale need not be in writing and may be proved by any means, including witnesses.[56] Most countries felt that writing requirements interfered with necessary speed.[57] Of course, an offeror may insist on a written acceptance,[58] or parties may agree to modify their contract only in writing.[59] With either side unable to agree on the basic issue, the Convention compromised. Article 96 allows states which require sales contracts to be in writing to declare article 11 inapplicable where any party has his place of business in that state.[60] Here, principles of conflict of laws determine whether a writing is necessary. For example, if conflicts principles point to the law of the declaring state a writing may be necessary, but if they point to the law of a nonwriting state the law of the latter state will apply. Thus the law of the declaring state does not automatically supersede the law of the

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[52] *See generally*, Date-Bah, *Problems of the Unification of International Sales Law from the Standpoint of Developing Countries*, in 7 DIGEST OF COMMERCIAL LAWS 39 (March 1980).

[53] *See* Farnsworth, *supra* note 39 (describing North-South and East-West confrontations during the Convention's negotiations).

[54] *See* Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 341 (1983).

[55] *See also* the Comecon Rules, which provide likewise that the offer and acceptance "shall be valid on condition that they are executed in written form." Within Comecon, however, there has been pressure to allow the contract to be proven by conduct. *See* T. HOYA, *supra* note 47, at 182.

[56] Art. 11.

[57] In civil and common law countries oral contracts made strides over the past century. Generally, commercial codes of civil law countries recognize oral contracts. England repealed the 1677 Statute of Frauds for commercial contracts in 1954. U.C.C. § 2-201 gives effect to oral contracts under certain circumstances. *See* Honnold, *The Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21, 26 (1984).

[58] *See* arts. 18 and 19.

[59] Art. 29.

[60] Art. 96, called the "statute of frauds" reservation. Hungary has ratified subject to art. 96.

nondeclaring state.[61]

Generally, East bloc countries do not give effect to trade usages, unless the parties explicitly agreed to them and they do not violate statutory provisions. In the Western world, flexibility of contract outweighs certainty and rigidity. Here, custom and usages are dealt a broader role. Under certain circumstances, trade usages may derogate from statutory law and may apply even where the contract is silent.[62]

In bridging the gap between East and West perspectives, the Convention binds the parties to any usage to which they have agreed[63] and to those usages which the parties knew or ought to have known were widely accepted in the industry.[64] Usages thus continue to play a role in international contract law.[65]

Most countries (East, West, North, or South) follow the mirror-image rule which holds that the acceptance must be the exact replica of the offer. An acceptance with different or additional terms is considered a rejection and counter offer. The United States forms the exception. Under the Uniform Commercial Code (UCC), an acceptance that states "terms additional to or different from those offered" operates as an acceptance, "unless acceptance is expressly made conditional on assent to the additional or different terms."[66] With the overwhelming majority of countries in favor of the mirror-image rule, the Convention's choice was simple. Article 19(1) states that a reply to an offer which contains additions or modifications operates as a rejection and counter offer.[67] Article 19(2) provides a limited exemption. As long as the additional or different terms do not "materially" alter the terms of the offer, offeree's reply constitutes an acceptance, "unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect."[68] Terms relating to price, payment, quality, place and time of delivery, extent of one party's liability, and settlement of disputes, however, are all deemed material.[69]

Finally, socialist countries objected to open price terms which

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[61] *See* art. 12, and discussion by J. HONNOLD, *supra* note 1, at 129.

[62] *See* U.C.C. §§ 1-205 and 2-208 giving effect not only to usage of trade, but also to course of dealing (sequence of previous conduct between the parties) and course of performance (where the sale involves repeated performance by the parties).

[63] Art. 9(1).

[64] Art. 9(2).

[65] One writer observed that "one of the most important features of the Convention is the legal effect it gives to commercial usages and practices." J. HONNOLD, *supra* note 1, at 112.

[66] U.C.C. § 2-207.

[67] Art. 19(1).

[68] Art. 19(2).

[69] Art. 19(3). It has been suggested that only minor variations, such as changing designation of the vessel, or packaging of the goods are nonmaterial. *See* Farnsworth, *Formation of Contract*, in INTERNATIONAL SALES, *supra* note 20, § 3.04, at 3-16.

could leave them in limbo, thus jeopardizing necessary certainty. U.S. law, on the other hand, allows for a reasonable price if the price is not settled.[70] With few countries recognizing such a reasonable price, article 14 of the Convention (in the formation section), seems to say that to be "sufficiently definite" an offer must expressly or implicitly fix the price.[71] If, however, a contract has been "validly concluded" but does not in any way fix the price, that price applies which is generally charged for similar goods at the time of entering into the contract.[72] Although not clear from doubt,[73] some room seems left for open price terms.

B. Sensitive Issues with Third World Countries[74]

A conflict with third world countries arose from the several notice requirements, especially those concerning nonconforming goods.[75] For example, most countries insist on strict notice of nonconformity so the seller can verify the defect and, where possible, cure. Thus, under article 39 a buyer loses the right to rely on nonconformity of goods if he fails to give prompt (at the latest two years

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[70] U.C.C. § 2-305.

[71] Art. 14:

> A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

Id.

[72] Art. 55 (under obligations of the buyer):

> 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.

Id.

[73] For example, can a contract be "validly concluded" without the price fixed? According to Honnold (J. HONNOLD, *supra* note 1, at 326), art. 55 only has independent meaning for countries which have not adopted the Formation Sections of the Convention. *But see* Farnsworth, *Formation of Contract* in INTERNATIONAL SALES, *supra* note 20, § 3.04 at 3-9; Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L. J. 265, 289 (1985) [hereinafter Rosett I] ("The language of this article [55] appears directly keyed to Art. 14(1) and seems to undercut the earlier provision"); Tallon, *The Buyer's Obligations under the Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES, *supra* note 20, § 7.03, at 7.9-.17.

[74] The North-South dialogue was characterized "first, by the economic fact that the developing countries mainly export raw materials and agricultural products, i.e. mass products, and import technology and finished goods; second, by the awareness of their market's underdeveloped technological and legal condition; and third, by their frequently justified mistrust of developed industrial states." *See* Eörsi, *supra* note 54, at 350.

[75] Other conflicts with third world countries included the application of trade usages (of which many developed during colonial times) and open price terms. The Convention's solutions to these issues have been discussed at *supra* notes 62-65, 70-73 and accompanying text.

from receiving the goods) and specific notice to the seller.[76] Developing countries (frequent buyers of heavy machinery needed in development), however, feared that defects may not show up until long after delivery or that business people would fail to appreciate the disastrous results of late or no notice.[77] To appease these countries the Convention adopted several exemptions to the strict notice rule. A seller may not rely on the lack of notice if the defect relates to facts which he knows or could have known about and which he did not disclose to the buyer.[78] Of greater importance, a buyer may deduct the value of the defect from the price if he has a reasonable excuse for not giving prompt notice.[79] Again, the Convention found a solution opposing parties were willing to accept.

Notice must also be given by a party who wants to suspend or avoid the contract. For instance, article 71 permits a party to suspend performance if it appears that the other might not perform (for example, due to an impending insolvency or based upon performance to date).[80] Further, under article 72 a party may avoid the contract completely if prior to the date of performance (anticipatory breach) it appears that the other party will commit a fundamental breach.[81] These required notices enable the other party to provide adequate assurance of performance and thus could not be eliminated. Nevertheless, developing countries were fearful of abuse of the power to suspend or avoid and the difficulty their businessmen might have reading, writing, or answering notices. Following a study by an ad hoc working group, certain compromises were reached. The notice of avoidance must only be given if time allows, and is not required if the other party has declared its intention not to perform its obligations.[82] Moreover, the anticipatory breach must be objectively

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[76] Art. 39.

[77] *See* Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary*, 11 REV. GHANAIAN L. 50 (1979). Ghana had important but illiterate tradesmen, who sometimes needed foreign experts to test imported complicated equipment. Also, it could take several years before delivered goods reached their final destination. *See id.* at 66-67.

[78] Art. 40.

[79] Art. 44.

[80] Art. 71.

> 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.

Id.

[81] Art. 72(1). "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." *Id.*

[82] Art. 72:

> (2) If time allows, the party intending to declare the contract avoided must

"clear."[83] In case of suspension the suspending party must continue performance if the other party provides adequate assurances. Obviously, under such circumstances parties must stay in contact and notify the other of exactly what is happening. However, to appease developing countries, the Convention elevated the standard for invoking the suspension right. Originally a suspending party needed only "good grounds to conclude" that the other would not perform.[84] Under final article 71, the nonperformance "must become apparent."[85] Thus, suspension cannot be made on mere hunches, but requires a high degree of probability of nonperformance.[86]

C. Sensitive Issues Between Civil and Common Law Countries

Civil and common law countries met head on in the field of remedies, particularly in the area of specific performance.[87] In common law countries the prevailing remedy is damages, and specific performance is only granted if the damages are inadequate, such as where the subject matter is unique or irreplaceable.[88] Civil law countries permit specific performance more generally.[89] Thus, in line with civil law thinking, the Convention allows the parties to require each other to perform.[90] In putting limits on specific performance, the buyer may require substitute performance only if the defect amounts to a fundamental breach.[91] Common law countries were still not satisfied. By way of compromise, article 28 states that a court need not order specific performance, "unless the court would do so under its own law in respect to similar contracts of sale not governed by the Convention."[92] U.S. courts faced with a remedy issue under the Convention, therefore need only grant specific performance in "unique" situations.[93]

Another civil law remedy raising eyebrows with common law

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give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Id.

[83] *See* art. 72(1).

[84] *See* J. HONNOLD, *supra* note 1, at 385-98.

[85] Art. 71(1).

[86] *See* J. HONNOLD, *supra* note 1, at 389.

[87] *See generally*, Gonzalez, *Remedies under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. LAW. 79 (1984); Stern, *A Practitioner's Guide to the United Nations Convention for the International Sale of Goods*, 16 N.Y.U.J. INT'L & POL. 81 (1983).

[88] *See* U.C.C. §§ 2-711(2) (on damages), 2-716 (buyer's right to specific performance).

[89] *See* Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247 (1979).

[90] Art. 46(1). "The buyer may require performance by the seller of his obligations unless . . . ." *Id.*; Art. 62. "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless . . . ." *Id.*

[91] Art. 46(2). For the definition of "fundamental," see art. 25 cited *supra* note 29.

[92] Art. 28.

[93] *See* J. HONNOLD, *supra* note 1, at 196.

countries is article 50, which allows the buyer unilaterally to reduce the price of nonconforming goods to the degree of deficiency.[94] Here common law buyers are limited to damages. Under Roman and civil law a seller was only liable for damages if he was guilty of fault or fraud. Delivery of nonconforming goods was not considered fault or fraud. On the other hand, it was thought unfair to have the buyer pay full price for defective goods. To prevent unjust enrichment, Roman law developed the action for the reduction of the price (*actio quanti minoris*), which was adopted later by the civil law.[95] Since civil law countries refused to part with their heritage, common law countries finally gave in. Not only was it thought that the remedy would be rarely invoked,[96] it also did not apply if the seller was precluded from exercising his right to cure.[97] Thus, one of the basic principles of remedies, a buyer's duty to mitigate damages, was not impaired by the Convention.

A civil law remedy finding its place in the Convention with less opposition is the German Nachfrist notice. Under this rule a buyer may fix an additional period of time of reasonable length for the seller to deliver.[98] The seller may extend the time for the buyer to pay the price or take delivery.[99] If buyer or seller fails to comply within this additional period, the other may withdraw from the contract without regard to whether the breach is fundamental.[100] With-

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[94] Art. 50:

> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

Id.

[95] *See* J. HONNOLD, *supra* note 1, at 313.

[96] *See* Bergsten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 225, 272, 275 (1979).

[97] Art. 50, (second sentence).

[98] Art. 47:

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

Id.

[99] Art. 63:

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

Id.

[100] *See* Art. 49(1)(b) (for buyer); Art. 64(1)(b) (for seller).

out such extra time a party may withdraw only for fundamental breach. This "after call" notice clarifies the position of the parties at an early stage and reduces difficulties in proving the seriousness of the breach. Because of this practical implication, the Nachfrist notice received general international approval.[101]

A minor friction between civil and common law countries was presented by the common law "mailbox" rule, which makes a written acceptance effective upon dispatch. The risk of transportation thus rests on the offeror. The mailbox rule dates back to the British case of *Adams v. Lindsell*,[102] in which the offeror misdirected the offer, thus delaying the offeree's acceptance. After dispatch of the acceptance, but before its receipt, the offeror had sold the goods to a third party. Upon a claim for damages, the court ruled for the offeree because the mishap occurred as a result of the offeror's neglect. It thereby created the mailbox rule, which has been followed in England and the U.S. ever since.

Civil law countries, on the other hand, adhered to the "receipt" rule, which puts the risk of mailing on the offeree. By selecting the medium, the offeree is considered in the best position to insure against possible delays and hazards. Consequently, article 18(2) declares an offer effective when it reaches the offeror.[103] In accordance with the dispatch rule, however, an offer may not be revoked if the revocation reaches the offeree after he has dispatched an acceptance.[104] Thus, dispatch remains the standard to determine timeliness of revocation of the offer.

The above discussion raises the concept of consideration, another issue on which civil and common law countries differ. Under common law an offer may be revoked until it is accepted, because the offeree has not paid consideration. Even "firm" offers stating to be irrevocable may still be revoked unless the offeree has paid peppercorn consideration. Civil law countries never adopted the concept of consideration, thus holding offerors accountable to firm offers. In balancing out civil and common law doctrines, the Convention first leans to the common law, declaring offers revocable.[105] It then carves out several restrictions. First, as said before, revocation is disallowed after dispatch of acceptance.[106] Firm offers and offers on which the offeree has acted in reliance are also irrevocable.[107] Fi-

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101 *See* J. HONNOLD, *supra* note 1, at 290-91 and 351-52.

102 1 Barn & Ald. 681 (K. B. 1818).

103 Art. 18(2). "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." *Id.*

104 Art. 16(1).

105 Art. 16(1). "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." *Id.*

106 *Id.*

107 Art. 16(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 rea-

nally, parties may change their contract without further consideration.[108] Although this provision seems to follow the civil law approach, the actual practice in common law countries is not that dissimilar. The UCC upholds firm offers and contract modifications without consideration.[109] Further, the doctrine of detrimental reliance has been recognized in the United States as a substitute for consideration.[110]

VIII. U.S. Response

Generally, individuals and institutions overwhelmingly responded in favor of the Convention following its adoption in 1980.[111] However, with the onset of Senate Hearings in April 1984, dissenting views were also expressed.[112]

A. The Convention's International Business Test

Criticism was directed against the way the Convention distinguishes international sales from other transactions.[113] The only requirement for application of the Convention is that parties have their places of business in different states.[114] Thus, according to the cri-

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sonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." *Id.*

[108] Art. 29(1). "A contract may be modified or terminated by the mere agreement of the parties." *Id.*

[109] Respectively, U.C.C. § 2-205 (firm offers in writing by merchants) and U.C.C. § 2-209 (a modification needs no consideration to be binding).

[110] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959). *See also* Lansing & Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contract for the International Sale of Goods*, 6 N.C.J. INT'L L. & COM. REG. 63 (1980).

[111] *See, e.g.*, Vienna Convention for Sale of Goods gets Strong Backing at ABA Session, 19 Int'l Trade Rep., U.S. Export Weekly (BNA), No. 19, at 728 (Aug. 16, 1983); *American Bar Association Report to the House of Delegates*, 18 INT'L LAW. 39 (1984). Also, foreign institutions as Comecon, LAWASIA, The Asia-African Consultative Committee, and the International Chamber of Commerce spoke out in favor of adoption of the Convention. *See* Sono, *The Role of UNCITRAL*, in INTERNATIONAL SALES, *supra* note 20, at §§ 4.01-.06.

[112] *See* Rosett I, *supra* note 73, and Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445 (1984) [hereinafter Rosett II]. *See also Senate Hearings*, *supra* note 6, statement by Frank A. Orban, III at 36 [hereinafter Orban Statement], statement of Arthur Rosett at 73 [hereinafter Rosett Statement], statement of Harold J. Berman at 79 [hereinafter Berman Statement]; Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984 (1984); Brooks, *Why Congress Should Be Wary of the U.N. Convention on the International Sale of Goods*, Heritage Foundation Backgrounder (No. 361) (June 15, 1984).

[113] Rosett I, *supra* note 73, at 269 ("The very interconnectedness of domestic and international economies that motivates the effort to harmonize contract law demonstrates that the international transaction often is neither functionally nor definitionally distinct from other sales."); Berman Statement, *supra* note 112; *Senate Hearings*, *supra* note 6, at 80; Brooks, *supra* note 112, at 3.

[114] Art. 1(1). In the event of multiple places of business, the place "with the closest relationship to the contract and its performance" counts, Art. 10(a). A temporary place during negotiations does not qualify. *Id. See* J. HONNOLD, *supra* note 1, at 44. *See also* Eörsi, *General Provisions* in INTERNATIONAL SALES, *supra* note 20, § 2.07 at 2-27.

tique, a contract between two U.S. citizens, one of which is based abroad, agreed to and performed wholly within the United States would be subject to the Convention, and not, more appropriately, the UCC.[115] On the other hand, an agreement between an American citizen and a foreigner (each having a business address in the United States) falls outside the Convention, notwithstanding the fact that the subject matter of the contract may travel around the world.[116]

It was suggested to add international border crossing as a test for international sales.[117] The Convention, however, had rejected this solution as impractical.[118] For example, at the time of sale a seller may be uncertain whether border crossing will take place. He may not then know whether to ship the goods from the United States or a foreign country, or whether in an "f.o.b. United States city" contract the buyer will take the goods abroad. In those cases, what happens after signing the contract determines the applicability of the Convention.[119] Another proposal was to make the use of international communications the criterion for international sales.[120] This test also has its problems as international agreements could be entered into without using any international communications, or in connection with local communications. The question then is which communication, local or international, facilitated the contract. Finally, because of difficulties of separating international from national sales, a third suggestion was to abolish plans for an international law of sales altogether.[121]

Realizing that no solution would be perfect, the Convention opted for a simple place of business test. Parties have complete freedom to opt out of the agreement. Thus the two U.S. citizens, one of whom lives abroad, may see no problem in electing the UCC as the governing law. Also, it is not unreasonable for a foreigner who maintains a place of business in the United States to familiarize himself with U.S. law. To abolish an international law of sales completely requires buyers and sellers of different countries to study each other's legal systems in many circumstances, the main feat the Convention seeks to prevent.

B. The Convention's Compromises

A second attack is directed against the Convention's compromis-

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115 *See* Berman Statement, *supra* note 112.

116 *Id.* at 80.

117 *See* Rosett I, *supra* note 73, at 275-79.

118 In addition to different places of business, the Convention's predecessor, the Hague Conventions, required border crossing or international communications or delivery as a condition for application. *Id.* at 274.

119 *See* J. HONNOLD, *supra* note 1, at 74.

120 Rosett I, *supra* note 73, at 275-79.

121 *Id.* at 269.

ing nature.[122] To promote acceptability, the Convention excludes several currently controversial issues, such as product liability and validity of contract. The scope of these exclusions is not always clear. For instance, does the exclusion for personal injury include claims for property losses? Do disclaimer clauses go to the validity of the contract and thus must be judged by domestic law, or are they of procedural nature and covered by the Convention? Conflict on these issues already exists.[123] Another problem is that international law continues to apply to questions not within the Convention's scope, thus exacerbating the legal uncertainty which the Convention seeks to resolve.[124] Recognizing the shortcomings, the drafters still preferred a limited Convention over no Convention.

Another attack on the compromising nature of the Convention is more subtle. Although acknowledging the virtue of compromise, the Convention is alleged to have ignored underlying differences, allowing inconsistencies to remain if agreement was unattainable.[125] By using vague or abstract language, it is said, the Convention sweeps problems under the rug rather than solving them.[126] Article 8 serves to illustrate. This Article deals with interpretation of statements or other conduct by the parties and applies to prior, present, and post-contract communications.[127] At issue is whether such statements should be received objectively or subjectively. While

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[122] *Id.* at 281-93; *see also* Note, *supra* note 112.

[123] *Compare* Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 FORDHAM L. REV. 863 (1985) (which argues that the U.C.C.'s provisions on disclaimer of warranties should be regarded as test for validity under the Convention) *with* J. HONNOLD, *supra* note 1, at 234 (who (hesitantly) regards disclaimer clauses as interpretation, not "validity").

[124] Berman Statement, *supra* note 112, at 80.

[125] Note, *supra* note 112, at 1988-89.

> The negotiators often declined to reconcile conflicts over fundamental principles. Instead, they sought to compromise on linguistic formulations amenable to all points of view-formulations that consequently lack any determinate meaning. These compromises appeared in several forms: a principal rule with exceptions, a rule accommodating many types of doctrines, or a rule consisting of conflicting or at least unresolved subparts.

Id.

[126] Rosett I, *supra* note 73, at 270-71.

[127] Art. 8.

> (1) For the purposes of this Convention, statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.

many countries originally adhered to the subjective theory of contract, most (including the United States) switched to an objective theory subject to certain exemptions. In perpetuating the subjective approach, article 8(1) holds that statements by a party are to be "interpreted according to his intent whether the other party knew or could not have been unaware what that intent was." In article 8(2) the Convention follows the objective theory, which reads that "if Article 8(1) is inapplicable, statements made by a party are to be interpreted according to the understanding that a reasonable person would have had." The objective path is also taken in article 8(3), which provides that in determining intent of a party or the understanding of a reasonable person, "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." The problem then is when to apply article 8(1) or article 8(2), and whether article 8(3) may be used both to determine whether a party knew or could not have been unaware what the other's intent was (article 8(1)), or is limited to determining the reasonable person standard under article 8(2).[128]

The difference between subsection (1) and (2) seems to be that in article 8(1) the listener understood or should have understood what the speaker meant, and in article 8(2) the listener had a different understanding. These are different situations, asking for a different solution. Thus, where the listener was aware, it is not unreasonable to allow the speaker's subjective intent to prevail. Where, as under article 8(2) the speaker created the ambiguity, however, it is not unreasonable that objective intent prevails. Further, when there is a question under article 8(1) as to whether the listener should have known the speaker's intent, the reasonable person test is applied to determine intent. It is the speaker who created the doubt.[129]

C. The Convention's Stultifying Nature

A further allegation is that the Convention freezes the law and stills growth. The Convention, it is said, is built in stone. State and federal governments are robbed from their powers to change the Convention, while UNCITRAL, a body working by unanimous consent, lacks the means and power to assume their role. Also, how can contracting states provide uniform answers without even a monitor-

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[128] Rosett I, *supra* note 73, at 288.

[129] Another inconsistency was said to be raised by the price term provisions (arts. 14 and 55) which have been discussed *supra* notes 70-73 and accompanying text; *see* Rosett I, *supra* note 73, at 288-89, ("Compromises [were] reached by including two inconsistent provisions: Articles 14 and 55, and open price terms.")

ing body in place?[130]

Although further development of the Convention will not be without problems,[131] the future does not seem as bleak as pictured. The Convention does not displace national law, but implements it in the international sphere, an area of law generally out of reach of domestic legislatures. Further, UNCITRAL does operate as a monitoring body in international trade.[132] Following a long and difficult delivery, it is not to be expected that UNCITRAL will abandon its baby. The Secretariat already has started to monitor the implementation of the Convention, and no doubt will find ways to collect and disseminate interpretations elsewhere. Should states become totally disgruntled with further developments, however, the Convention permits a total denunciation by formal notice in writing to the U.N. Secretary.[133]

IX. The Convention's Future

Whatever the trials and tribulations during gestation, the world generally has received the Convention favorably and is slowly understanding its meaning. With growing knowledge of the Convention, its acceptance is becoming more widespread. In the next five years thirty to forty countries are expected to ratify the Convention.

The recent U.S. Senate ratification has made the Convention a *fait accompli* for American business and its legal presentation. Business people must learn to take advantage of the Convention's provisions, or to prevent surprises. An actual first task will be to "opt out" of the Convention in those contracts which allow for a more

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[130] Rosett I, *supra* note 73, at 295-99.

[131] Art. 7 alone, which requires interpretation in "good faith," in conformity with "general principles," and by "the rules of private international law," opens up a true Pandora's box.

[132] *See Training and Assistance of the Secretary General*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Nineteenth Session, New York, 16 June - 11 July 1986, U.N. Doc. A/CN.9/282 (1986):

> By its resolution 40/71 of 11 December 1985 on the report of the Commission on the work of its eighteenth session, the General Assembly reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law. It also reaffirmed the desirability for the Commission to sponsor symposia and seminars, in particular those organized on a regional basis, to promote training and assistance in the field of international trade law. The General Assembly also expressed its appreciation to those governments, regional organizations and institutions that had collaborated with the Secretariat in organizing regional symposia and seminars, and invited Governments, international organizations and institutions to assist the Secretariat in financing and organizing symposia and seminars, in particular in developing countries. The General Assembly also invited Governments, relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions which might be utilized to enable nationals of developing countries to participate in symposia and seminars.

Id.

[133] Art. 101.

favorable clause.[134] But should the Convention be the choice of law, an "opt-in" clause may be necessary in situations where the place of business test leaves doubt. A review of standard form contracts is warranted in light of the Convention.

Companies with little clout may wish to take immediate advantage of the Convention. By including the Convention in their negotiations and agreements they will avoid having to argue against foreign law. Companies with clout may want to test the Convention, especially in American courts, as the courts will play a leading role in clarifying the Convention.[135] Therefore, a "choice of court" clause should be included wherever possible. Additionally, parties should include a choice of law clause for issues falling outside the Convention.[136]

Another task will be to keep a record of new adhering states. It is not unlikely that as an outflow of the United States accession, other states will follow in rapid succession.[137]

Finally, Americans should remain involved in the ongoing dialogue on the Convention. Although the Convention's creation took over fifty years, this was only the courtship period. To help the marriage succeed and to enable the Convention to fulfill its purpose (reaching agreement with foreign buyers and sellers on the applicable law and decreasing legal costs in researching and proving foreign law) increased worldwide participation and cooperation continues to be important.

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[134] For suggested "opt-out" clauses see Question 4, *Senate Hearings*, *supra* note 6, at 58. By excluding the Convention in favor of state law, the Convention may still apply. Treaty law may be considered part of state law.

[135] "The delegates, by compromising on indeterminate rules, seem to have placed on national courts the ultimate burden of defining standards of conduct." Note, *supra* note 112, at 1989.

[136] Farnsworth has stated that in appropriate cases the Convention may be applied by courts as well as arbitral tribunals (19 Int'l Trade Rep., U.S. Export Weekly (BNA) No. 14, at 527 (July 12, 1983)), thus suggesting a governing law clause also in arbitration clauses.

[137] Business Law Inc., recently began a new looseleaf publication on the Convention.