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A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods

by Paul Lansing* and Nancy R. Hauserman**

NOTE: All references in the article to the "Convention" mean the draft Convention. The final text, which was adopted in 1980, did not become available from the United Nations until this article had gone to press. While the substance of the Convention is almost identical to the draft, numeration changes did occur. Cross references are listed on the final page of this article.

In 1966 the United Nations General Assembly established the U.N. Commission on International Trade Law (UNCITRAL).¹ UNCITRAL was intended to promote "the progressive harmonization and unification of the law of international trade."² UNCITRAL's major accomplishment has been the production of a Convention on Contracts for the International Sale of Goods (Convention).³ On June 16, 1978, UNCITRAL unanimously approved the draft of the Convention.⁴ Some five months later, the U.N. General Assembly convened an international conference for the adoption of the final text in 1980. This international conference was successfully concluded at Vienna, Austria in April, 1980. Individual nations must now decide whether to adopt the work of

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¹ 21 U.N. GAOR, Supp. (No. 16) 99, U.N. Doc. A/RES/2205 (XXI) (1966). The original members of UNCITRAL were: Argentina, Australia, Belgium, Brazil, Chile, Colombia, Congo, Czechoslovakia, Egypt, France, Ghana, Hungary, India, Iran, Italy, Japan, Kenya, Mexico, Nigeria, Norway, Romania, Soviet Union, Spain, Syria, Tanzania, Thailand, Tunisia, United Kingdom, and United States. *Report of the United Nations Commission on International Trade on the Work of Its First Session*, 23 U.N. GAOR, Supp. (No. 16) 2, U.N. Doc. A/7216 (1968) [hereinafter cited as *First Session U.N. Rep. on Int'l Trade*].

² *First Session U.N. Rep. on Int'l Trade*, *supra* note 1, at 3.

³ Final Act of the United Nations Conference on Contracts for the International Sale of Goods, April 10, 1980, U.N. Doc. A/Conf. 97/18. The full text of the draft Convention may also be found in 27 AM. J. COMP. L. 325 (1979).

⁴ 33 U.N. GAOR, Sixth Comm. (62d mtg.) 6, U.N. Doc. A/C6/33/SR62 (1978).

UNCITRAL.⁵ The purpose of this paper is to discuss some of the background to the Convention and to compare the Convention to the Uniform Commercial Code (UCC or Code). This comparison will include a discussion of formation of contracts (offer and acceptance), statute of frauds, and consideration.

I. Background

The Convention is the latest in a series of attempts begun in the nineteenth century which were aimed at reconciliation of differences between the common and civil law regarding the sale of goods.⁶ Since the latter part of the nineteenth century, the Government of the Netherlands has been active in unification attempts.⁷ In 1893, civil procedure and personal status conventions, prepared at a conference at the Hague, were ratified throughout Europe.⁸ Almost fifty years later, in 1935, a preliminary draft Uniform Law on the International Sale of Goods (ULIS) was developed by the International Institute for the Unification of Private Law (UNIDROIT).⁹ ULIS was modified in 1939,¹⁰ but because of the Second World War, efforts in this field were then suspended for a number of years. Though efforts were recommenced in 1951, Congress did not authorize the United States to join UNIDROIT until 1964.¹¹ In that same year UNIDROIT produced both a new version of ULIS¹² and a Uniform Law of the Formation of Contracts for the International Sale

⁵ See 35 U.N. GAOR, Supp. (No. 17) A/35/17, U.N. Doc. A/CN.9/183 (1980).

⁶ For a more detailed discussion of the background of the convention see Lansing, *The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL*, 8 AM. BUS. L.J. 269 (1980).

⁷ See [1874] FOR. REL. U.S. 791.

⁸ See generally Dunham, *A History of the National Conference of Commissioners on Uniform State Law*, 30 LAW & CONTEMP. PROB. 235 (1965).

⁹ UNIDROIT is also known as the Rome Institute. See Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959) for a discussion of the 1930's ULIS texts.

¹⁰ PROJET D'UNE LOI UNIFORME SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS ET RAPPORT (1939) (U.D.P. Projet I(1)). Draft Uniform Law on International Sale of Goods reprinted in [1948] UNIFICATION OF LAW 103 (UNIDROIT).

¹¹ Act of Dec. 30, 1963, Pub. L. No. 88-244, 77 Stat. 775 (currently codified at 22 U.S.C. § 269(g) (1976)). This law also authorized membership in the Hague Conference on Private International Law, a permanent organization at the Hague devoted to the problems of conflicts of laws. The United States has traditionally taken an attitude of indifference toward efforts at international cooperation in private and commercial law matters. The success of the Uniform Commercial Code and the reorientation of American foreign policy after World War II were partly responsible for the American willingness to participate in the international unification of law movement.

¹² Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, [1972] Gr. Br. T.S. No. 74 (Cmd. 5029), with Annex, Uniform Law on the International Sale of Goods [hereinafter cited as ULIS] reprinted in 13 AM. J. COMP. L. 453 (1964). The Sales Convention has been ratified or acceded to by Belgium, West Germany, United Kingdom, Gambia, Israel, Italy, Netherlands, and San Marino. Ratification by the United Kingdom was subject to a reservation making the Uniform Law applicable only when the parties have chosen that law as the law of the contract. The Formation Convention has been ratified or acceded to by the above States, with the exception of Israel. See DÖLLE, KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 2, 668 (1976). For a more thorough discussion of the 1964 Hague Conference see Bernini, *The Uniform Laws on International Sales: The Hague Conventions of 1964*, 3 J.

of Goods (ULF).¹³

Provisions in the ULIS agreement permitted citizens of any nationality to select ULIS as the governing law of their contracts.¹⁴ Otherwise, ULIS applied only to contracts in which both the parties and the transaction had an international character. For example, a transaction between a German company and a Brazilian company which took place wholly within the United States would not have been regulated by ULIS.¹⁵ On the other hand, a contract dispute between businesses in two non-ratifying countries could be adjudicated under ULIS provisions if one of the parties had been able to obtain jurisdiction over the other within a ratifying state.¹⁶ Even though the United States had not ratified the convention, ULIS could have been applied to international transactions to which a U.S. citizen was a party.

In the conflict of laws area, ULIS authors meant to have ULIS constitute a comprehensive body of international sales law. To this end, ULIS excluded the application of any national law or any conflict of laws rules that would apply national law, unless the parties provided for such in their contract.¹⁷ In the situation where a case could not be decided by the ULIS provisions, ULIS asked that the matter be governed by principles in spirit with ULIS and not by reverting to national law.¹⁸ When it became apparent that the 1964 texts (ULIS and ULF) would not be widely accepted,¹⁹ new efforts were begun and UNCITRAL was established.²⁰

Under the UNCITRAL Convention, Article 1(1) states the general rules for determining whether the Convention is applicable to a contract for the sale of goods as follows:

- (1) This convention applies to contracts of sale of goods entered into by parties whose places of business are in different states

WORLD TR. L. 671 (1969); see also Sutton, *The Hague Conventions of 1964 and the Unification of the Law of International Sales of Goods*, 7 U. QUEENSLAND L.J. 145 (1971).

¹³ Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 1972 Gr. Br. T.S. No. 75 (Cmd. 5030), with Annex I, Uniform Law on the Formation of Contracts for the International Sale of Goods [hereinafter cited as ULF], reprinted in 13 AM. J. COMP. L. 472 (1964).

¹⁴ ULIS, *supra* note 12, art. 4.

¹⁵ *Id.* art. 1, paras. 1, 3.

¹⁶ *Id.* art. 1, para. 3.

¹⁷ "Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law." *Id.* art. 2.

¹⁸ *Id.* art. 17.

¹⁹ The 1964 texts were not accepted for a number of reasons. The composition of the drafting participants was criticized as being dominated by the western world. In addition, ULIS and ULIF were silent on many practical problems. Note, *United Nations Commission on International Law: Will a Uniform Law in International Sales Finally Emerge?*, 9 CAL. W. INT'L L.J. 157, 163-65 (1979). A prominent scholar in the field also criticized ULIS as "a shortsighted attempt to impose upon the world a uniform law not agreed upon by its principle trading nations." Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbrolio*, 74 YALE L.J. 449, 462 (1969).

²⁰ See note 1 *supra*. For a more in depth comparison of ULIS and the Convention, see Note, *supra* note 19.

- (a) when the States are Contracting States, or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.²¹

The Convention thus applies to a greater number of transactions than did ULIS which contained a requirement that a sales transaction be international in character in order for ULIS to apply. The Convention would apply if the buyer and seller had their principal places of business in different countries which were ratifiers of the Convention, or where sale and delivery of goods occurred within one country if private international law so dictated. Article 1(1)b of the Convention restores national law as supplementary law, to be applied when a conflict of laws problem arises which cannot be resolved through the Convention.

As noted previously, the work of UNIDROIT which concluded at the 1964 Hague Conference produced two separate conventions: the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods.²² The initial intention of UNCITRAL was to follow UNIDROIT's lead and prepare two separate drafts, but in 1978 UNCITRAL decided to integrate the two drafts. However, under the 1978 Convention each State will have the option of ratifying Part II on formations without ratifying Part III on the rights and duties of the parties, or vice-versa.²³ One should remember that the issues are closely intertwined and that the rules on formation embody principles that are included in the separate sales draft.

II. Comparison of the Convention with the Uniform Commercial Code²⁴

A. Introduction

The following comparison of the Convention and the Uniform

²¹ Convention, *supra* note 3, art. 1(1).

²² See notes 12 and 13 and accompanying text *supra*.

²³ Part I defines the scope of the Convention and contains further general provisions applicable to the whole Convention; Part IV will contain the final clauses to be formulated in the diplomatic conference. Convention, *supra* note 3.

²⁴ This footnote includes the table of contents of both the Convention and the UCC. They are set out so that the reader may readily see what subjects the two works cover.

United Nations Convention on Contracts for the International Sale of Goods

Part I. Sphere of Application and General Provisions

Chapter I. Sphere of Application

Articles 1 through 5

Chapter II. General Provisions

Articles 6 through 11

Part II. Formation of the Contract

Articles 12 through 22

Part III. Sales of Goods

Chapter I. General Provisions

Articles 23 through 27

Chapter II. Obligations of the Seller

Article 28

Section I. Delivery of the Goods and Handing over of Documents

Commercial Code concepts of formation of contracts should be read

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- Articles 29 through 32
 - Section II. Conformity of the Goods and Third Party Claims
 - Articles 33 through 40
 - Section III. Remedies for Breach of Contract by the Seller
 - Articles 41 through 48
 - Chapter III. Obligations of the Buyer
 - Article 49
 - Section I. Payment of the Price
 - Articles 50 through 55
 - Section II. Taking Delivery
 - Article 56
 - Section III. Remedies for Breach of Contract by the Buyer
 - Articles 57 through 61
 - Chapter IV. Provisions Common to the Obligations of the Seller and Buyer
 - Articles 62 through 64
 - Section I. Anticipatory Breach and Installment Contracts
 - Articles 65 through 69
 - Section II. Exemptions
 - Article 65
 - Section III. Effects of Avoidance
 - Articles 66 through 69
 - Section IV. Damages
 - Articles 70 through 73
 - Section V. Preservation of the Goods
 - Articles 74 through 77
 - Chapter V. Passing of Risk
 - Articles 78 through 82.

Uniform Commercial Code

- Article 1. General Provisions
 - Part 1. Short Title, Construction, Application and Subject Matter of the Act
 - Part 2. General Definitions and Principles of Interpretation
- Article 2. Sales
 - Part 1. Short Title, General Construction and Subject Matter
 - Part 2. Form, Formation and Readjustment of Contract
 - Part 3. General Obligation and Construction of Contract
 - Part 4. Title, Creditors and Good Faith Purchasers
 - Part 5. Performance
 - Part 6. Breach Repudiation and Excuse
 - Part 7. Remedies
- Article 3. Commercial Paper
 - Part 1. Short Title, Form and Interpretation
 - Part 2. Transfer and Negotiation
 - Part 3. Rights of a Holder
 - Part 4. Liability of Parties
 - Part 5. Presentment, Notice of Dishonor and Protest
 - Part 6. Discharge
 - Part 7. Advice of International Sight Draft
 - Part 8. Miscellaneous
- Article 4. Bank Deposits and Collections
 - Part 1. General Provisions and Definitions
 - Part 2. Collection of Items: Depositary and Collecting Banks
 - Part 3. Collection of Items: Payor Banks
 - Part 4. Relationship between Payor Bank and Its Customer
 - Part 5. Collection of Documentary Drafts
- Article 5. Letters of Credit
- Article 6. Bulk Transfers
- Article 7. Warehouse Receipts, Bills of Lading and Other Documents of Title
 - Part 1. General
 - Part 2. Warehouse Receipts: Special Provisions
 - Part 3. Bills of Lading: Special Provisions
 - Part 4. Warehouse Receipts and Bills of Lading: General Obligations

keeping in mind some basic distinctions between the two. First, the Convention is intended to be the relevant contract law in contracting States. Unlike the UCC, the Convention is not, except in limited circumstances, intended to be supplanted by existing law.²⁵ The Uniform Commercial Code, on the other hand, relies extensively on the general law relating to the sale of goods so that general contract law is applicable except where displaced by the Code.²⁶ It would seem that this difference would give the Code more latitude. To some extent this assumption is verified by a comparison of the Code and the Convention. Neither the Code nor the Convention sets out the details of contract formation. For example, neither define consideration, capacity, or questions relating to effects of legality of subject matter. However, the Code, with its explanatory comments, in most respects appears to be much more detailed than the Convention.²⁷ The Convention contains more unanswered questions and in general less guidance for contract framers and courts than does the UCC. Because of this lack of detail, it will be years before the nuances and confusions of the Convention are settled.²⁸ What follows is an attempt to discuss the Convention and to identify the major differences that exist between the Convention and the UCC.

B. Formation of the Contract

Part II of the Convention is entitled "Formation of the Contract."

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- Part 5. Warehouse Receipts and Bills of Lading: Negotiation and Transfer
 - Part 6. Warehouse Receipts and Bills of Lading: Miscellaneous Provisions
 - Article 8. Investment Securities
 - Part 1. Short Title and General Matters
 - Part 2. Issue—Issuer
 - Part 3. Transfer
 - Part 4. Registration
 - Article 9. Secured Transactions; Sales of Accounts and Chattel Paper
 - Part 1. Short Title, Applicability and Definitions
 - Part 2. Validity of Security Agreement and Rights of Parties Thereto
 - Part 3. Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority
 - Part 4. Filing
 - Part 5. Default
 - Article 10. Effective Date and Repealer
 - Article 11. Effective Date and Transition Provisions

²⁵ See Convention, *supra* note 3, arts. 1, 4, 5, 11, (X).

²⁶ See U.C.C. § 1-103.

²⁷ The 1976 Draft of the Convention was accompanied by a commentary. See [1976] Y.B. UNCITRAL 87. In general, the commentary did not explain the articles on formation of the contract discussed herein. The comments are more historical in nature, citing the differences between ULIS and the Convention and the compromise that might be reflected by an Article.

²⁸ To some extent, one may argue that the interpretive process is always time consuming. Considering the importance of the Convention's scope, the volatile state of international economics and politics and the experience of the Code and its international counterparts, it does not seem unreasonable to have expected that the Convention would be more precise.

In this regard, the difference between the Code and the Convention can perhaps best be summed up by what one author described as a distinction between a Code and a Statute, the former being more definitive and comprehensive than the latter. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1042-43 (1961).

Within this part Articles 12 through 22 set out the Convention provision on Offer and Acceptance. Like U.C.C. § 2-204(3), Article 12(1) indicates that it is not necessary to have all terms set out in order for an offer to be sufficient.²⁹ It would appear that the primary determinant of the sufficiency of a proposal will be the intent of the offeror.³⁰

The intent behind such a provision in the Convention appears to be consistent with the intent of the UCC framers to provide adequate information on which a Court could base an appropriate remedy.³¹ Unlike the language of U.C.C. § 2-204(3) which does not specify which "open terms" will effect the sufficiency of the offer, Article 12(1) does attempt to propose a test of sufficiency: "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."³²

Article 12(1) of the Convention indicates that an offer must be ". . . addressed to one or more specific persons."³³ While this wording does not appear in the UCC,³⁴ it would be an error to necessarily presume that a greater degree of specificity or some higher standard is required by the Convention. Indeed, the Convention merely reflects the common law decisions defining offer.³⁵ However, an exception to Article 12(1)'s requirement is set out in Article 12(2).³⁶ That article allows a proposal generally addressed to be considered an offer if the proposer so intends. Again, the importance of the intention of the offeror is reflected in the Convention.

Convention Article 13(1) sets out the common law understanding of the point at which an offer becomes effective.³⁷ The UCC does not include such detail because the UCC follows the common law rules appli-

²⁹ See, e.g., Convention, *supra* note 3, arts. 12, 29, 31, 51, 53, 7, 8; U.C.C. §§ 2-204(3), 2-305, 2-503, 2-504, 2-507, 2-511, 1-205, 2-208, 2-207(3).

³⁰ Art. 12 states:

(1) 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.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Convention, *supra* note 3, art. 12. See also Murphy, *Facilitation and Regulation in the UCC*, 41 NOTRE DAME LAW. 625, 637 (1966). Note that the UCC modifies common law which required more definiteness.

³¹ Murphy, *supra* note 30, at 627. See also Comments to U.C.C. § 2-204.

³² Convention, *supra* note 3, art. 12(1).

³³ *Id.*

³⁴ See U.C.C. §§ 2-206, 2-205.

³⁵ RESTATEMENT (SECOND) OF CONTRACTS §§ 23, 24, 25, 28 (1973); Craft v. Elder & Johnson Co., 34 Ohio App. 2d 605, 38 N.E.2d 417 (1941).

³⁶ See note 30 *supra*. See also RESTATEMENT (SECOND) OF CONTRACTS § 28 (1973).

³⁷ See Convention, *supra* note 3, art. 13(1); RESTATEMENT (SECOND) OF CONTRACTS §§ 23, 24, 25, 28 (1973); Craft v. Elder & Johnson Co., 34 Ohio App. 2d 605, 38 N.E.2d 417 (1941).

cable to contract formation unless otherwise delineated.³⁸

Article 13(2) of the Convention speaks to the withdrawal of an offer. At first blush it would appear to be consistent with the common law interpretation. The first sentence of this Article sets out the common law understanding regarding withdrawal of offers before they reach the offeree.³⁹ The second part of Article 13(2) states that an offer ". . . may be withdrawn even if it is irrevocable."⁴⁰ Because this Article deals with withdrawal, it is logical to assume that this sentence refers only to the withdrawal of offers *before or concurrent with* the time they reach the offeree.⁴¹

Article 14 reflects the Convention's position on revocation of offers. While Article 14(1) begins with the common law understanding that an offer may be revoked prior to acceptance, several important distinctions and inconsistencies between this section and later sections of the Convention must be noted. Initially, the Convention conditions revocation on the revocation reaching⁴² the offeree ". . . before . . . [the offeree] has *dispatched* an acceptance."⁴³ This is not the same as saying that the revocation must reach the offeree before the acceptance is effective because the effectiveness of an acceptance is conditioned on such acceptance reaching the offeror.⁴⁴ Article 14 does not say either explicitly or implicitly that revocation must be received before the acceptance is effective.⁴⁵

Under the common law, it is possible that an offeree may dispatch an acceptance thereby making the contract effective, even if the offeror has already sent a revocation. This situation would arise where such revocation is received by the offeree after the dispatch of the acceptance. Such result is consistent with the common law notion that acceptance is effective upon dispatch. Interestingly, it appears that one would get the same result under the Convention rules, although the Convention purports to follow the civil law receipt theory. If a revocation cannot be made after the offeree dispatches his/her acceptance, and dispatch in and of itself does not render the acceptance effective but merely results in the offeror's receipt of the same, the effect of Convention Article 14(1)

³⁸ See U.C.C. §§ 1-103, 1-201(11).

³⁹ "An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer." Convention, *supra* note 3, art. 13(2).

⁴⁰ *Id.*

⁴¹ It is important, albeit confusing, to keep in mind the Convention distinctions between "withdrawal" (art. 13) and "revocation" (art. 14). The distinction is one of timing (whether or not the offer is received by the offeree) and, of course, effect on creation of the contract.

⁴² For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Convention, *supra* note 3, art. 22.

⁴³ *Id.* art. 14(1) (emphasis added).

⁴⁴ *Id.* art. 22.

⁴⁵ See *id.* art. 16 regarding when the acceptance is effective.

will be the same as that of the common law approach. Because the Convention clearly makes the effectiveness of an acceptance conditioned on the offeror's receipt, one might expect that Article 14(1) would condition the effectiveness of the revocation on the offeree's receipt of the revocation before the offeror's receipt of the acceptance.

Allowing for revocation under Article 14(1), the Convention proceeds to set out the circumstances under which an offer cannot be revoked in Article 14(2). Basically, a statement of time or other statement of irrevocability or reasonable reliance by the offeree will render an offer irrevocable. There is no mention of the UCC "Firm Offer" concept⁴⁶ or of any maximum time limit on irrevocability.⁴⁷

Because the Convention, like the UCC, allows for performance as acceptance,⁴⁸ presumably revocation would not be allowable under Convention Article 14(1) or 14(2) once the offeree began performance. The Convention does not specify that the beginning of performance may bar revocation; however, it seems reasonable to assume that performance, once begun, would compare to "dispatch" of acceptance, as defined in Article 14(1), or to the offeree's reasonable reliance, which Article 14(2)(b) describes, if the requirements of Article 16(2) and (3) are met.⁴⁹

Article 15 sets out the effect of the offeree's rejection as termination of the offer. The emphasis on effectiveness in Article 15 is, again, upon receipt by the offeror.⁵⁰ The use of receipt for rejection reflects the common law.⁵¹ Recall, as previously stated, that the effectiveness of the offeree's actions are conditioned on the offeror's *receipt* pursuant to Article 22. In contrast, the offeror's revocation, dealt with in Article 14(1), is conditioned on lack of *dispatch*.

Article 16 begins the Convention explanation of acceptance. This

⁴⁶ U.C.C. § 2-205 defines a firm offer as follows: "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time . . . [not to] exceed three months"

⁴⁷ Query whether it would be reasonable for an American offeree who relies on the UCC to assume irrevocability based on reliance on U.C.C. § 2-205 especially where consideration had been given. Presumably such a situation would fall under Convention art. 7 interpretation.

⁴⁸ See Convention, *supra* note 3, art. 16; U.C.C. § 2-206(1)(6).

⁴⁹ Both the UCC and the Convention vary general contract law in this regard. Under common law principles an offeror can revoke his/her offer at any time prior to acceptance. This is true even though the qualifications of art. 14(2)(a) are met. A common law exception is the "option"—when consideration has been given to hold the offer open. Further exceptions include, in some states, contracts under seal and increasingly the promissory estoppel situation under art. 14(2)(b) often in the form of "promissory estoppel."

Of course, there is always the potential problem of the offeror's lack of knowledge. The problem arises in the situation where the offeror is aware that the offeree has begun performance or dispatched an acceptance and the offeror attempts to revoke the offer. Presumably, under the Convention, such revocation would be ineffective and further action by the offeror based on the revocation would result in breach of contract.

⁵⁰ "An offer, even if it is irrevocable, is terminated when a rejection *reaches* the offeror." Convention, *supra* note 3, art. 15 (emphasis added). Art. 22 sets out the Convention meaning of "reaches."

⁵¹ See RESTATEMENT (SECOND) OF CONTRACTS § 39, Comment a (1973).

Article contains one of the major Convention variances from both the common law and the UCC. The effectiveness of the acceptance under the Convention is based on the receipt theory; in other words, the acceptance becomes effective upon the offeror's receipt of the same.⁵²

The Convention does reflect the UCC approach which seeks to avoid the notion that acceptance must necessarily be made in the same manner or mode as that in which the offer was extended.⁵³ However, U.C.C. § 2-206(1) begins with the caveat "(1) Unless otherwise unambiguously indicated by the language or circumstances . . .," implying that if the offeror specifies the mode of acceptance such specified mode must be followed.⁵⁴ The Convention contains no specific deference to the language of the offer. Arguably, this objection may be covered by the reference in Article 17(1) to counteroffers, assuming that a variance in mode of reply is construed as a "modification."⁵⁵ The Convention language appears more specific regarding the required mode of acceptance for an oral offer: "An oral offer must be accepted immediately,"⁵⁶ followed by the modifying language ". . . unless the circumstances indicate otherwise."⁵⁷ However, Convention Article 16(2) is consistent with the common law concept that if no time for acceptance is stated in the offer, the offer will nevertheless terminate upon lapse of a reasonable period of time.

Paragraph (3) of Convention Article 16 parallels U.C.C. § 2-206(1)(b) and permits acceptance by action where appropriate. The absence of language in the Convention concerning or permitting acceptance by shipment of nonconforming goods⁵⁸ would appear to be a distinction between the Convention and the UCC. However, such a distinction may be more of a distinction in clarity and style than in actual content. Article 17 seems to imply the UCC result in its language about counteroffers.⁵⁹ Of course, under the UCC should the seller intend such nonconforming shipment as acceptance, the buyer has legal remedies for

⁵² While the UCC does not specify "dispatch" as the time when acceptance necessarily takes place, common law reflects this position and the UCC relies on common law except where supplanted or superceded by Code language. U.C.C. § 1-103. See RESTATEMENT (SECOND) OF CONTRACTS § 64 (1973). Art. 16 is consistent with the civil law approach. See J.B. MOYLE, CONTRACT OF SALE IN THE CIVIL LAW 44 (1892). Note also that while the Convention art. 16 conditions effectiveness on receipt, under art. 14(1) an offeror is precluded from revoking his/her offer once the offeree *dispatches* his/her acceptance. An acceptance may therefore be constructively effective upon dispatch since the offeror can no longer revoke the offer. See Convention, note 3 *supra*.

⁵³ See, e.g., U.C.C. § 2-206, Comment 1.

⁵⁴ See *id.*

⁵⁵ See note 61 *infra*.

⁵⁶ Convention, *supra* note 3, art. 16(2).

⁵⁷ *Id.* This draft language reflects the general contract law interpretation of what constitutes a "reasonable time" when parties deal face to face.

⁵⁸ See U.C.C. § 2-206.

⁵⁹ See note 61 *infra*.

breach of contract.⁶⁰

Convention Article 17 pertains to the U.C.C. § 2-207 situation in which the offeree's acceptance includes new or different terms. An interesting difference between the two sections (U.C.C. § 2-207 and Article 17) is that the Convention begins with an assumption that any variance constitutes a counteroffer pursuant to Article 17(1) and caveats this assumption in the following section.⁶¹ On the other hand, the UCC assumes that a reply is an acceptance even when the reply varies from the terms of the offer.⁶² In the same section the UCC also warns of situations where such an assumption would be inaccurate.⁶³

The Convention does not contain language corresponding to that of U.C.C. § 2-207(3).⁶⁴ Comment 6 to section 2-207 indicates that section 2-207(3) is intended to cover those situations where no response or reply concerning the additional or different terms is received. U.C.C. § 2-207(3) provides for those situations in which the offeror does not respond to variances in the offeree's purported acceptance and those variances clearly conflict with the offeror's terms, resulting in the "battle of the forms" situation.⁶⁵ Again, the UCC gives paramount importance to the parties intent to be bound and favors contract formation. The Code also assumes the offeror's objection and construes the contract excluding such conflicting terms.⁶⁶ The Convention does not include similar or corresponding language regarding this situation. It may be assumed, therefore, that under the Convention, where forms conflict, the terms

⁶⁰ See UCC §§ 2-206(1)(b) and 2-601, Comment 4. One should note Convention remedies beginning with Article 41 and distinguish between UCC remedies.

⁶¹ (1) A reply to an offer which purports to be an acceptance containing conditions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Convention, *supra* note 3, art. 17(1), (2).

⁶² A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, *unless* acceptance is expressly made conditional on assent to the additional or different terms (emphasis added).

U.C.C. § 2-207(1).

⁶³ *Id.* See also U.C.C. § 2-207, Comment 2.

⁶⁴ Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

U.C.C. § 2-207(3).

⁶⁵ A "battle of the forms" situation arises when "both parties to a contract intend to avail themselves of their own general conditions and for that purpose expressly refer to them in their declaration of offer or of acceptance." Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Trade Law*, 27 INT'L & COMP. L.Q. 413, 435 (1978).

⁶⁶ See U.C.C. § 2-207(3), Comment 6; U.C.C. § 2-201.

expressed in the offeree's response will modify the offeror's terms unless specifically objected to by the offeror or deemed material under Article 17(2) and (3). On the other hand, the intent of the framers of the Convention may be to imply an objection where conflicting forms are used. The lack of clarification suggests that this is an area which will be ripe for judicial interpretation.

The first sentence of Convention Article 17(2) corresponds to that part of U.C.C. § 2-207(2) which designates a course of dealing between merchants. The Convention does not distinguish between merchants and nonmerchants. Therefore, there is no implication that any difference in the effect of additional terms exists.⁶⁷ It is important to note, however, that the Convention does not include a provision similar to U.C.C. § 2-207(2)(a) by which the additional terms do not become a part of the contract if "... the offer expressly limits acceptance to the terms of the offer."⁶⁸ The drafters of Article 17 assume perhaps that if the offeror had expressed such limits, any variance by the offeree would be regarded as a "discrepancy" to which the offeror would object "without undue delay" or make a counteroffer.⁶⁹

The final section of Article 17 provides a definition of the Convention concept of "materiality."⁷⁰ It is unclear whether or not this definition is intended to be illustrative or inclusive. U.C.C. § 2-207 does not set out such parameters in its text although Comment 4 thereto sets forth, by way of example, terms or variances which might be considered material.⁷¹

⁶⁷ The distinction between merchants and nonmerchants is not made in the Convention. While the scope of the Convention does not necessarily preclude nonmerchants, the essence and purpose of the Convention, *international* sale of goods, leads one to the assumption that only merchants will be covered. See 1964 ULIS, note 12 *supra*; commentary to 1976 of the Convention, note 27 *supra*.

Such a distinction is important under the UCC since the Code application may vary accordingly. See, e.g., U.C.C. §§ 2-201(2), 2-205, 2-207(2).

⁶⁸ U.C.C. § 2-207(2)(a). See Convention, *supra* note 3, art. 17(2).

⁶⁹ Convention, *supra* note 3, art. 17(1).

⁷⁰ Additional or different terms, relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes, are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

Id. at art. 17(3).

⁷¹ Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

U.C.C. § 2-207, Comment 4. Note that this comment begins with the words "Examples of," establishing that the comment is *not* intended to be all inclusive.

Furthermore, the areas identified by Convention Article 17(3) as being material are so broad as to potentially include most additional or different terms. This lack of clarity is especially important if the Convention Article terms are intended to be inclusive. Arguably, those clauses which the UCC identifies as nonmaterial variances⁷² would be implied by the breadth of the Convention language. For example, U.C.C. § 2-207, Comment 5, includes among its examples of nonmaterial variances “. . . a clause setting forth and perhaps enlarging slightly upon the seller’s exemption due to supervening causes beyond his control” The question remains as to whether this situation, identified as nonmaterial in the UCC,⁷³ will be considered a material variance within the Convention language of “. . . relating . . . to the . . . extent of one party’s liability to the other”⁷⁴

Finally, the last clause of Article 17(3) caveats the Convention definition of “material” variance by noting that if an offeree reasonably believes that the additional or different term(s) are acceptable to the offeror, then such terms as would normally fall within the first clause of Article 17(3) will not be considered material and presumably will become a part of the contract absent an objection from the offeror. There is no indication of what will or might be grounds for such a reasonable belief.⁷⁵

If the offer specifies that acceptance must be made within a certain period of time, when does that time period begin to run? What happens if holidays or other nonbusiness days fall within the designated time period? Article 18 purports to be the Convention answer to these questions. To answer the latter question, Article 18(2) specifies that holidays or other nonbusiness days will operate to extend the offer only if their occurrence precludes delivery of the acceptance to the offeror on the last day for acceptance. In other words, holidays or other nonbusiness days which fall within the time period, as opposed to the last day of the time period, do not extend the time period. This extension applies only when delivery of the acceptance is to be made at the offeror’s place of business; presumably, if delivery of the acceptance is to the offeror’s home, this extension is not applicable.

The first part of Article 18 addresses the question of when the calculation of time should begin. Obviously, the calculation may not pose a particular problem if the offer is delivered orally, if the time period expressed is lengthy and the delivery of the offer is delayed, or if the time

⁷² See U.C.C. § 2-207, Comment 5.

⁷³ *Id.*

⁷⁴ Convention, *supra* note 3, art. 17(3). See note 70 *supra*.

⁷⁵ Past dealings or trade usage might possibly constitute such reasonable belief. *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962). See RESTATEMENT (SECOND) OF CONTRACTS §§ 59, 60, 70 (1973); *United States v. Braunshein*, 75 F. Supp. 137 (S.D.N.Y. 1947); *Application of Doughboy Industries*, 17 A.D.2d 216, 233 N.Y.S.2d 488 (1962). See also U.C.C. §§ 2-208, 1-205.

period for acceptance is exceptionally short. In the United States, this question has not been uniformly answered. Some courts have held that, because the offer is not effective until received by the offeree, any time stated shall not begin to run until such receipt.⁷⁶ The alternate view adopted by some American courts is expressed in the Convention approach, in which the clock begins to run at the date of the offer.⁷⁷ This Convention provision does not alter the effectiveness of the offer because the offer is not effective until it reaches the offeree. However, this provision makes it clear that any time provided in the offer begins to run not from the date the offer is effective (when received by the offeree)⁷⁸ but from a date internal to the offer (the date of the letter or postmark).⁷⁹

The basic purpose of Article 19 appears to be the acknowledgement that an acceptance which is delayed may still operate as an effective acceptance and should not automatically be construed as a counteroffer.⁸⁰ Presumably, Article 19(1) is intended to cover those situations where acceptance is delayed for any reason, including delay caused by the offeree. This section states that an acceptance is nonetheless effective and therefore not to be construed as a counteroffer if the offeror immediately notifies, in writing or orally, the offeree of the acceptance.

The second section of Article 19 appears to be directed at the situation where the acceptance is delayed because of some fault on the part of the transmitting agent, for example, delay because of the mail or telegram. The two sections are worded differently so that while Article 19(1) makes the effectiveness of the acceptance conditional on the offeror's approval, Article 19(2) presumes that the acceptance will be valid where the delay is not the fault of the offeree unless the offeror informs the offeree to the contrary.⁸¹ The underlying effect of the Article is to promote contract formation where the offeree is an innocent party and put the burden of nonformation on the offeror.

Convention Article 20 addresses the withdrawal of an acceptance. In essence, the Article permits withdrawal as long as the withdrawal reaches the offeror before the acceptance or concurrent with the time the

⁷⁶ See, e.g., *Caldwell v. Cline*, 156 S.E. 55 (W. Va. 1939).

⁷⁷ Convention, *supra* note 3, art. 18(1). See, e.g., LUSK, HEWITT, DONNEL & BARNES, BUSINESS LAW 106 (1978).

⁷⁸ A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

Convention, *supra* note 3, art. 18(1).

⁷⁹ See *id.* art. 22 for a definition of "reaches".

⁸⁰ *Id.* art. 19(1).

⁸¹ The language of article 19 does not specifically state that subsection (1) does not cover the same situation as subsection (2). Subsection (1) is not so clearly worded as to preclude the interpretation that any delay, regardless of its cause, requires the offeror's approval for effectiveness. However, one must presume that this was not the intent of the Convention's framers or they would not have included subsection 2 in article 19. See *id.* art. 19(1) & (2).

acceptance would have become effective. It seems reasonable to presume that the latter circumstance means that the acceptance and the withdrawal would reach the offeror at the same time since the acceptance is only effective if it reaches the offeror.⁸²

Article 21 states simply that the contract formation is concluded at the moment of an acceptance in accord with the Convention provision. This concept of the time of contract formation is consistent with the UCC and common law notions.⁸³ It is important to remember that a difference exists between the receipt and dispatch theories to determine when an acceptance is effective.⁸⁴

Article 22 defines the word "reaches" for the purpose of Part II of the Convention. This Article corresponds to the UCC definition of "notifies."⁸⁵ In this respect, the Convention does not appear to permit the implication of notice included in U.C.C. § 1-201(25)(c).⁸⁶ It may be that the writers of the Convention felt that the substance of the receipt theory, in contrast with the UCC dispatch theory, precludes the possibility of "implicit" knowledge and that the language of U.C.C. § 1-201(26) "[w]hether or not such other actually comes to know of it" is therefore also moot under the Convention.

C. Statute of Frauds

While the UCC includes a Statute of Frauds⁸⁷ the Convention posits no such requirement.⁸⁸ Under the Convention, contracts may be proven by any form, including use of the testimony of a witness. The only proviso would be the Article presently notated Article (X) in the Convention which recognizes the right of a Contracting State to declare a Statute of Frauds requirement.⁸⁹

Several problems are likely to occur under Article (X). Article (X)

⁸² See Convention, *supra* note 3, arts. 16, 22.

⁸³ *Adams v. Lindsell*, 1 Barn. & Ald. 681 (Kings Bench 1818); *Dick v. United States*, 72 F. Supp. 326 (Ct. Cl. 1949).

⁸⁴ Additionally, there is no Convention statement similar to U.C.C. § 2-204(2).

⁸⁵ See U.C.C. §§ 1-201(25), (26).

⁸⁶ "[A]n offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means" Convention, *supra* note 3, art. 22 (emphasis added).

It is conceivable that the phrase "by any other means" is intended to include implicit notice or knowledge but the rest of the Article refers to various mailing addresses and such an interpretation may be presumptuous.

⁸⁷ U.C.C. § 2-201.

⁸⁸ See Convention, *supra* note 3, art. 10.

⁸⁹ A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

Id. art. (X).

refers to the necessity of a writing for the party who has his/her place of business in the Contracting State. Hypothetically, assume A, who has a place of business in X, and B, who has a place of business in Y, enter into a contract, the performance of which will take place in Z. Assume X, Y, and Z are all Contracting States.⁹⁰ If either X or Y has declared a Statute of Frauds requirement for the Convention, the contract must be in writing to be enforceable in State X, Y, or Z.⁹¹ If neither X nor Y, where the contracting parties have their places of business, require a writing, but Contracting State Z, the place of performance, requires a writing, an oral contract would be enforceable.⁹²

A second area of concern arises from the obvious fact that some Contracting States, such as the United States and Australia, are themselves comprised of several "states." Article (X) does not appear to address this situation. Because contract law in the United States is largely a matter of state law, would a declaration of a Statute of Frauds provision be passed by the federal government to apply uniformly within the United States for purposes of contracts formed under the Convention, or would each state rely on its own provisions? The Convention would presumably become federal treaty law because acceptance of the Convention would be by the United States as a nation. Therefore, Convention provisions, including those under Article (X) declaration, would supersede the UCC.⁹³ If the declaration was made dependent on each individual state's determination then international contracting parties should be cautioned to check not only the law of the Contracting State, but also the law of states within that Contracting State.⁹⁴

Of course, most business contracts are in writing, thereby eliminating the problems posed above and minimizing the need for concern as to whether the Convention contains a Statute of Frauds condition.

D. Consideration

Formation of a contract under the Convention does not require the presence of consideration. It is not clear, however, that consideration is

⁹⁰ *Id.* art. 1 (Contracting States).

⁹¹ *See* Convention, *supra* note 3, art. (X). Many contracts, especially in the realm of international sale of goods, specify in the contract language the place in which suit shall be brought. The Convention does not vary this freedom of contract.

⁹² *Id.*

⁹³ Because the UCC is state law, any valid and conflicting federal law supersedes it. *See, e.g.*, Federal Bills of Lading Act, 49 U.S.C.A. §§ 81-124 (1976) which supersedes Article 7 if a transaction is interstate. U.C.C. §§ 1-103, 9-104.

⁹⁴ However, this caution might be modified depending on the answers to the hypothetical posed above. For instance, it is possible that the contracting party whose business is located in a Contracting State, having declared a Statute of Frauds, should be responsible for such knowledge and that a failure to put the contract in writing would render the contract unenforceable only for him/her or only if suit is brought in his/her Contracting State. Additionally, it is conceivable that the United States could elect not to declare a Statute of Frauds provision but this seems an unlikely possibility in view of the overwhelming adoption of the UCC and its Statute of Frauds in the United States.

an issue under the Convention. Because the scope of the Convention is limited to international sales contracts, the probability of such a transaction resulting in a unilateral contract is minimal.⁹⁵ Obviously, the overwhelming majority of contracts for the sale of goods are bilateral in nature, with the parties exchanging mutual promises.⁹⁶

The illusory promise issue in U.S. contract law is another UCC problem that is not present under the Convention. A promise that appears to be mutually binding might be illusory under U.S. contract law, rendering the contract invalid. The same situation under the Convention would not affect the validity or enforceability of the contract; therefore, the parties would be bound on even the force of an illusory promise.⁹⁷ Further, legality and validity in the absence of consideration under the Convention are not akin to U.S. law. While general contract law clearly mandates consideration as a prerequisite for a binding contract, the Uniform Commercial Code makes exceptions in several important areas.⁹⁸

III. Conclusion

Any exercise in the unification of law is fraught with complication. An attempt at unifying varied and often incompatible legal rules and procedures presents a multitude of problems. When the scope of the unification is international, the problems are further complicated by variances in entire legal systems, language complexities, and political, social, and economic considerations.⁹⁹ Language complexities are found not only in the problem of translating an idea or concept into several languages, but also in the problems inherent in retaining the original meaning and creating consistency of that meaning. Political considerations include not only the complex of relationships between participating countries at the conventions but also the willingness, or lack thereof, of some countries to be involved in the endeavor.¹⁰⁰ When such reluctance is expressed by a country as economically powerful as the United States, the scope and import of any proposal are bound to be effected. In light of this intricate web, it is remarkable that the completion of a workable instrument in international trade law has been achieved.¹⁰¹

⁹⁵ It is unlikely that the problem of a gift would be involved because such a situation would presumably be beyond the scope of the Convention. See Convention, *supra* note 3, art. 3.

⁹⁶ As a general rule, U.S. courts do not check the adequacy of consideration. RESTATEMENT (SECOND) OF CONTRACTS § 81 (1973). See also, Murphy, *supra* note 30, at 630.

⁹⁷ Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 316 (1979). Eörsi cautions that lack of consideration may also be a problem which presumes that in any event the Convention is not concerned with "validity." See also Convention, *supra* note 3, art. 4 and supplementary covenants.

⁹⁸ See U.C.C. §§ 2-209(1), 2-306(2), 1-107, 5-105.

⁹⁹ For a European perspective on the Convention, see Bonell, *supra* note 65.

¹⁰⁰ See generally, Berman & Kaufman, *The Law of International Commercial Transactions*, 19 HARV. INT'L L.J. 221 (1978).

¹⁰¹ See note 5 *supra*.

In the final analysis, the Convention is not likely to present complex legal adjustments for American attorneys schooled in the Uniform Commercial Code. Indeed, many attorneys will be pleasantly surprised by the relative ease with which transition between legal schools of thought can be accomplished. The compatibility of the legal systems may be difficult but it is certainly not impossible. The Convention Articles on Formation of Contract represent an attempt to meld the common and civil law systems. In attempting to assess the relative merits of the two systems and to incorporate these merits into the Convention, the drafters have also inserted some confusion and inconsistencies. It may be that the lack of clarity cited by the authors of this paper and others is a result of the complexity of translating one thought into a rule workable in several languages. The availability of the drafting history and inclusion of a commentary accompanying the Convention text should serve as a guidepost in interpreting and utilizing the Convention; of course, some points of clarification may have to await the realities of practice and judicial pronouncement.

As of this writing, there is every reason to anticipate ratification of the Convention by most nations. It seems likely that such ratification will in some measure effect a majority of international sales transactions and it therefore becomes incumbent upon practicing attorneys and academicians to become familiar with the Convention on Contracts for the International Sale of Goods.

APPENDIX

Draft	Convention
1-4	Same
—	New Art. 5
5-11	6-12
—	New Art. 13
12-24	14-26
(X)	96