

*Report No 23*

The United Nations Convention on Contracts for  
the International Sale of Goods:  
New Zealand's Proposed Acceptance

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The United Nations Convention on Contracts for the  
International Sale of Goods:  
New Zealand's Proposed Acceptance

June 1992

Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

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XX June 1992

Dear Minister

I am pleased to submit to you Report No 23 of the Law Commission, *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance*.

As you know, the Law Commission, in consultation with officials of your Department and others, has been considering whether New Zealand should accept the Convention and give effect to it as part of the law of New Zealand. The Commission agrees with the broadly held view that New Zealand should take those steps.

The Law Commission accordingly supports the Government's intention to introduce implementing legislation and to accede to the Convention once the legislation has been enacted. This Report gives the reasons for those positive answers. It is also designed to enhance the understanding of the Convention among the trading community and the legal profession, in part because the Convention already applies to much New Zealand trade.

Yours sincerely

K J Keith  
President

Hon Douglas Graham MP  
Minister of Justice  
Parliament House  
WELLINGTON





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# I Introduction

## THE CONVENTION

- 1 This Report concerns the United Nations Convention on Contracts for the International Sale of Goods adopted in 1980. The English text of the Convention is set out in appendix A. The uniform law which it states regulates first the formation of international sales contracts and second the rights, obligations and remedies of the buyers and sellers under those contracts. When it applies, it avoids the often complex problems of first ascertaining the applicable law in accordance with conflict of laws doctrines, and second determining what is required by the applicable foreign law once it has been ascertained. In the words of John Honnold, a principal author of the Convention, "The half century of work that culminated in the 1980 Convention was sustained by the need to free international commerce from a Babel of diverse domestic legal systems", *Documentary History*.<sup>1</sup>
- 2 The Convention is increasingly applicable to world trade as more and more States accept the Convention and make the rules of the Convention part of their law. They now number 34, they engage in about 60 percent of the world's external trade, and they include most of New Zealand's major trading partners among them Australia. The Contracting States are listed in appendix B and relevant trade figures are included in appendices C and D. The Convention applies to sales contracts between parties in different Contracting States (States which have accepted the Convention) and also, in general, to such contracts between parties in different States if the contracts are governed by the law of a Contracting State. The consequence of that latter means of application is that many international sales

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<sup>1</sup> See the bibliography in Appendix E for the abbreviations used in the text.

contracts involving New Zealand businesses are probably already governed by the Convention (see paras 38-39).

#### THE QUESTIONS CONSIDERED IN THIS REPORT

- 3 The first question which arises for New Zealand is whether it should accede to the Convention and enact legislation to implement it. A related question is whether understanding of the Convention is sufficiently widespread through the business and professional communities. If it is not, what can be done about that? As just indicated, that second question is already a practical one for New Zealand business. It will become even more pressing if, as a result of an affirmative answer to the first question, the Convention becomes more widely applicable to New Zealand external trade.
- 4 This Report is designed to provide background to the Convention and a description and evaluation of the rules it states (including some indication of the differences between the Convention and existing New Zealand law) (chapters 2 and 3). The description and evaluation should help provide a basis for a better understanding of the Convention, although, as the bibliography in appendix E indicates, this can be no more than a brief introduction with some emphasis on the New Zealand situation. The fourth and final chapter gives the Commission's reasons for supporting accession to the Convention and the enactment of implementing legislation.

#### NEW ZEALAND EXTERNAL TRADE: FUNDAMENTAL CHANGES IN DIRECTION AND APPLICABLE LAW

- 5 For well over a century New Zealand's external trade was mainly subject to a uniform set of legal rules. The trade was essentially within the British Empire (later the Commonwealth) and especially with the United Kingdom and was governed by a combination of (a) the "law of England" (including legislation and based in significant measure on the law merchant which had governed European and Mediterranean trade in earlier times) which became applicable in many colonies on their foundation and (b) major British commercial statutes enacted in

the nineteenth century which were adopted with no or little change throughout the Empire.

- 6 Significant differences have developed between United Kingdom law and the law of the former colonies and between the law of the former colonies themselves. Local circumstances and changing trading relationships led to distinct legal developments. More recently, Britain's entry into the European Community has led to both major changes in trade patterns and a different direction for its legal development.
- 7 The following table clearly demonstrates some of the major changes in New Zealand's trading partners. It sets out the percentages of trade (export and import) over the past 60 years with the United Kingdom, Australia, the United States, Japan and others:

**New Zealand's Changing External Trade Relationships**

	<i>United Kingdom</i> %E:1	Australia %E:1	United States %E:1	Japan %E:1	Others %E:1
1930	81 : 47	3 : 8	5 : 18	: 1	11 : 26
1940	90 : 47	1 : 16	3 : 12	: 2	6 : 23
1950	66 : 61	2 : 12	10 : 7	1 :	21 : 20
1960	53 : 44	4 : 18	13 : 10	3 : 3	27 : 25
1970	36 : 30	8 : 21	16 : 13	10 : 8	30 : 28
1980	14 : 14	13 : 29	14 : 14	13 : 13	46 : 40
1990	5 : 9	20 : 21	14 : 18	17 : 16	44 : 36

Department of Statistics: *New Zealand Official 1990 Yearbook* ; and *Overseas Trade 1990* (1991)

The regional figures are also striking; 28 percent of New Zealand's external trade is now with five northern Asian economies (Republic of Korea, China, Hong Kong, Japan and Taiwan), 18 percent with the European Community (including the United Kingdom), and 18 percent with North America. There are also important trade links with other countries in Asia (Indonesia, Malaysia and Singapore), Latin America (Mexico), Middle East (Iran) and Eastern Europe (Russia). New Zealand export trade is accordingly now potentially subject to a great variety of legal systems, some very different from the legal systems of New Zealand and those of the small groups of States with which New Zealand traded for so long.

- 8 Increasingly therefore there is a need to be aware, in international commercial dealing, of the significant differences that may exist between New Zealand law and that of the other country (or countries) involved. There would be little need for concern were New Zealand law to apply to every transaction but this will not be the case. The parties will often agree to apply a foreign law, and New Zealand business will often have to agree (and in many cases, should agree) to the application of the law of another country. If no law is expressly chosen, it will be for the relevant conflict of law rules of the State where the question may be litigated to identify the governing law which will often be a foreign law.
- 9 The uncertainties and potential costs associated with transacting business under unfamiliar laws increase the risks of international commerce, and are likely to reduce its efficiency. There may be uncertainty
- whether the particular law applicable in the case will vary according to the forum in which the issue is determined ("forum shopping"),
  - whether different laws may apply in respect of different aspects of the one transaction,
  - about the law which is applicable to all or part of the contract, or
  - about the substance of the applicable foreign law.
- 10 Even in those many cases where there will be no doubt about the applicable law, the significant costs of determining the substance of that law and its effect on the transaction will remain to be paid. The substance of the applicable law may also be unsatisfactory. A widely acceptable and accepted, uniform, generally understood set of rules avoids all of those problems.

#### INTERNATIONAL TRADE LAW

- 11 Problems such as those just mentioned, together with the associated impediments to trade and resulting costs, have for some time led to international responses. The responses take a variety of forms, for instance through multilateral or bilateral

treaties, recommended models, or unilateral actions (including legislative actions) taken by governments or by relevant trade organisations. Those responses relate to matters such as

- (a) jurisdiction over commercial and civil matters and the enforcement of judgments and arbitral awards given in such matters,
- (b) uniform choice of law rules, aimed at ensuring that the same system of national law is applied wherever the proceedings are brought,
- (c) uniform substantive law aimed at ensuring the same result wherever proceedings are brought, and
- (d) uniform or standard terms of contract or practices, voluntarily accepted by the parties to the particular transactions.

12 National actions within (a) - (c) might be taken to give effect to a treaty obligation of the State, as with legislation relating to arbitration (para (a)), or the Warsaw Convention on carriage by air (para (c)). There may be a unilateral national law reflecting widely accepted principle, as with choice of law rules relating to bills of exchange (para (b)). Or the parties might use a standard form of agreement or terms designed to determine the basic obligations, as with World Bank loans or the standard terms developed by the International Chamber of Commerce (para (d)).

13 This action has also for some time been promoted and facilitated by international bodies, set up by States or less formally, and with broad or sectoral responsibilities. Appendix F briefly describes some of those bodies. One which is of major significance both generally and for this Report is the United Nations Commission on International Trade Law (UNCITRAL). The preamble to the resolution of the United Nations General Assembly setting up that body 25 years ago articulates the reasons for international action in this way:

The General Assembly,

...

Considering that international trade co-operation among States is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security,

Recalling its belief that the interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade,

Reaffirming its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade,

Having noted with appreciation the efforts made by intergovernmental and nongovernmental organisations towards the progressive harmonisation and unification of the law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures,

Noting at the same time that progress in this area has not been commensurate with the importance and urgency of the problem, owing to a number of factors, in particular insufficient co-ordination and co-operation between the organisations concerned, their limited membership or authority and the small degree of participation in this field on the part of many developing countries,

Considering it desirable that the process of harmonisation and unification of the law of international trade should be substantially co-ordinated, systematised and accelerated and that a broader participation should be secured in further progress in this area,

Convinced that it would therefore be desirable for the United Nations to play a more active role towards reducing or removing legal obstacles to the flow of international trade,

... .

(GA resolution 2205 (XXI) of 17 December 1966)

- 14 UNCITRAL in the subsequent 25 years has acted to give concrete meaning to these broad purposes. To mention just two matters relating to Law Commission work, UNCITRAL promoted acceptance of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and it prepared the 1985 Model Law on International Commercial Arbitration. The 1958 Convention was given effect in New Zealand by the Arbitration (Foreign Agreements and Awards) Act 1982; and the Law Commission's recent report on *Arbitration* (NZLC R20 1991) is based on the 1985 Model Law and would continue to give effect to the 1958 Convention and as well to the 1923 and 1927 agreements relating to arbitration drawn up within the League of Nations. That

Report briefly describes some of the more recent work of UNCITRAL, and recalls a 1985 General Assembly resolution which reaffirms that the mandate of UNCITRAL,

as the core legal body within the United Nations system in the field of international trade law, [is] to coordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonisation of international trade law. (See NZLC R20 paras 55-59.)

A most important product of UNCITRAL is the United Nations Convention on Contracts for the International Sale of Goods to which we now turn.

#### A BRIEF HISTORY OF THE CONVENTION

- 15 We mention the origins of the Convention for two reasons. They help emphasise the objective of facilitating international trade. And, as indicated later, the drafting history may also be relevant to the interpretation of the Convention (eg paras 48-49).
- 16 The concern expressed over centuries about the barriers to international trade caused by national differences in the law of contract led in 1929 to the International Institute for the Unification of Private Law (UNIDROIT) sponsoring the drafting of a uniform law on the international sale of goods. The process was interrupted by the Second World War but was soon resumed and led to the adoption in 1964 by a Diplomatic Conference of two Conventions which set out a Uniform Law for the International Sale of Goods and a Uniform Law on the Formation of Contracts for the International Sale of Goods. Only 28 States attended the Conference and of them 19 were from Western Europe, three from Eastern Europe (but not the USSR), only Colombia from Latin America, only Japan from Asia, and only the United Arab Republic from Africa. The Conventions came into force eight years later, on their ratification by five States. The Conventions failed to achieve wide acceptance, with only seven European and two other countries becoming party to them.
- 17 UNCITRAL faced a choice in its early sessions: should it promote acceptance of the 1964 Conventions (as it did with the 1958 Convention on Foreign Arbitral Awards, para 14) or should it prepare a new text dealing with this vital matter? It



adopted the latter course, very much as a result of the comments which it sought and received from States. To quote the Secretary of UNCITRAL at the time:

It became evident [from the comments] that the 1964 Conventions, despite the valuable work they reflected, would not receive adequate adherence. The basic difficulty stemmed from inadequate participation by representatives of different legal backgrounds in the preparation of the 1964 Conventions; despite efforts by UNIDROIT to encourage wider participation these Conventions were essentially the product of the legal scholarship of Western Europe. *Uniform Law* 53-54.

- 18 By 1978 UNCITRAL had completed a draft Convention composed of parts on sales and on formation which were developed out of the two 1964 Conventions. The earlier drafts were prepared by a widely representative working group of States which was aided by the contribution as observers of a number of international organisations. The General Assembly of the United Nations convened a diplomatic conference to consider the draft Convention.
- 19 That conference adopted the Convention at Vienna on 11 April 1980 without a dissenting vote and opened it for signature and acceptance. The UNCITRAL Secretary during the 1970s concludes his account of the process of the adoption of the text with the comment that:

the spirit of consensus that had developed in UNCITRAL was maintained to the end of the Diplomatic Conference. *Uniform Law* 56.

- 20 The Convention came into force on 1 January 1988 a little over a year after the tenth (and eleventh) acceptances. Appendix B shows a major increase in acceptances since, a matter on which we comment in chapter 4.

#### OBJECTIVES OF THE CONVENTION

- 21 Two paragraphs of the preamble to the Convention set out objectives which can be related back to those stated in the resolution establishing UNCITRAL and quoted in para 13:

*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Being of the opinion* that the adoption of uniform laws which govern contracts for the international sale of goods and take into account the different social, economic

and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

... .

- 22 The process of preparation of the draft Convention and the generally unanimous support for its provisions at the widely representative diplomatic conference which adopted it strongly suggest that those purposes have been achieved. That appears to be further confirmed by the subsequent acceptance of the Convention. The substantive rules are acceptable to and accepted by civil and common law jurisdictions, developed and developing countries, capitalist and socialist economies, and exporters and importers of agricultural and mineral primary products and manufactured goods. This is not a case of uniformity for the sale of uniformity. Rather the world trading community has made the practical judgment that this uniform law will facilitate international trade.
- 23 To be acceptable the Convention must also take account of the special characteristics of international sale of goods contracts, especially the distances involved, the costs of transportation, the involvement of intermediaries, and the long term that many are to operate. One consequence is an emphasis in the Convention on the preservation of the contract notwithstanding default or other non-compliance. This means that the remedies (especially those available to buyers) are extended beyond those normally available under New Zealand law.
- 24 The Convention recognises in major ways that the parties to such contracts may for good reason wish to exercise broad contractual freedom. Article 6 (which is discussed in chapter 3) enables them to exclude the application of the Convention and to derogate from or vary the effect of any of its provisions (with a limited exception if local law requires contracts covered by the Convention to be in writing). That means that if a trader wishes to have its national law applied - and the other party can be persuaded - the new rules in the Convention do not apply to the extent of that agreement. The very significant role of trade usages and practices between the parties is also expressly recognised by the Convention. In the absence of such agreements between the parties, the uniform rules do however apply.

- 25 A major element in the successful application of the rules to remove legal barriers to and promote international trade is the ir uniform interpretation. The Convention takes a first step in the direction of avoiding divergent national interpretations by emphasising the international character of the rules, uniformity of application, the observance of good faith, and the application of the general principles underlying it (art 7 which is discussed in chapter 2). Another important feature of the Convention is its very limited use of technical legal terms and concepts. It is said to have the characteristics of simplicity, practicality and clarity. It is free of legal shorthand, free of complicated legal theory and easy for business people to understand. It is written in their language, Professor Sono, "The Vienna Sales Convention: History and Perspective" in the *Dubrovnik Lectures* 1, 7.
- 26 Those various elements of the Convention, and other features involving changes from the present law, do at the same time present problems. Aspects of the Convention have provoked negative comment. The Convention may introduce uncertainties (although the uncertainty of the present legal position should not be underestimated). The next two chapters address some of those problems with the two purposes already indicated: to provide information and opinion relevant to the evaluation of the Convention and acceptance of it; and to help enhance understanding of the Convention. It will be important for those affected by the Convention to be aware of those problems, especially since parties have an almost unlimited freedom to amend or even to completely replace the rules in the Convention. The parties' practices, usages, standard terms and specific agreements can overcome most if not all of the perceived problems, and those methods will often be better and more effective than will be diverse national laws.
- 27 Some of those uncertainties and criticisms have been stressed by those with whom the Commission has consulted. We are again very grateful for the comment we have received (almost all of it supportive of the proposed acceptance and implementation of the Convention). As explained in appendix G, that process of consultation was more limited than usual, principally because in this case the major consultation was that which had already occurred through international processes undertaken during a period of 50 years and especially within

UNCITRAL in the 1970s and at the diplomatic conference of 1980 which adopted the Convention.

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## II An Overview of the Convention

28 This chapter explains briefly the main provisions of the Convention. It also notes major differences from New Zealand law. It considers in turn

- varying acceptance of the Convention
- the application and scope of the Convention
- interpretation
- the formation of contracts
- the obligations of the parties and their remedies.

### VARYING ACCEPTANCE OF THE CONVENTION BY CONTRACTING STATES

29 The Convention facilitates flexibility in the acceptance of the rules it sets out in two important ways. As already mentioned, the parties to the sales agreement can themselves by agreement vary or displace the uniform rules if they are otherwise applicable (art 6). Chapter 3 considers that important power of the parties. Here we note the prior power of States to become bound by less than the whole Convention. The basic rule is that States cannot make any reservations except those expressly authorised (art 98). The Convention authorises five different reservations (or declarations). The details of the declarations made by particular States appear in appendix B. Some are mentioned in the following paragraphs.

*Territorial application*

- 30 A State consisting of territorial units in which different systems of law apply may confine the territorial extent of its acceptance (art 93). So the Canadian accession does not extend to Quebec and the Yukon.

*Only contracts between parties in Contracting States*

- 31 A State may limit the scope of application of the Convention to contracts between businesses in separate Contracting States, excluding the additional category of contracts which are subject to the law of a Contracting State, it being irrelevant in which two or more States the parties carry on their businesses (art 95; see art 1(1)(b), discussed in paras 38-39.) China, Czechoslovakia, the United States and Canada (in respect of British Columbia) have made that reservation. A Bill introduced into the British Columbia legislature in April 1992 will allow the withdrawal of its reservation, (Bill for Attorney General Statutes Amendment Act 1992 cl 13).

*Exclusion of rules **either** about formation **or** about obligations*

- 32 A State can declare that it will not be bound either by Part II (about the formation of the contracts) or by Part III (about the obligations of the parties under the contracts). This power effectively means that the Convention (like the 1964 texts) can be divided into two, with States deciding to accept either the rules about the formation of international sales contracts or those about the operation of the contracts. The limited acceptance has a corresponding limiting effect for the operation of the Convention in relation to other Contracting States. So far, such declarations have been made only by Denmark, Finland, Norway and Sweden in respect of Part II concerning the formation of contracts. (There is a Nordic Convention on the formation of contracts.) Those States have also made the reciprocal declarations referred to in paras 34-35.
- 33 The above three reservations may be made only at the stage of the final acceptance of the Convention. They cannot be made later. They can however be withdrawn - and thereby the full scope of application of the Convention can be achieved. By contrast, the following two reservations may be made at any time.

It will be noted that the first is made by agreement with another State and operates only in relation to businesses in the two States in question. Accordingly the interests of other Contracting States are protected (or largely so) from the effect of the new reservation.

*Reciprocal variations*

- 34 Two or more Contracting States with the same or closely related legal rules may at any time declare that the Convention is not to apply to contracts of sale or to their formation if the parties have their places of business in those States. Similar provisions can be made in relation to non-Contracting States (art 94). As noted (para 32), only four Scandinavian States have taken advantage of this facility. We later record that around the time of its accession Australia considered - but rejected - the possibility of making such a declaration in relation to New Zealand (para 130).
- 35 The Convention in a more general way recognises the power of the Contracting States in their relations with one another to depart from the terms of the Convention. Article 90 provides that the Convention does not prevail over any international agreements governing the same matters provided that the parties to the sales agreement have their places of business in the Contracting States to that international agreement.

*Contracts to be in writing*

- 36 The Convention does not require the contract to be in any particular form. However to gain the support of some planned economy countries, the Convention allows States whose legislation requires sales contracts to be in writing to declare that provisions of the Convention allowing the contract or steps relating to it to be other than in writing do not apply when a party has its place of business in that State (art 96). China, two South American and four Eastern European States have made this declaration.

## APPLICATION AND SCOPE OF THE CONVENTION

- 37 The Convention states a uniform set of rules for the contracts which it governs. Those contracts are defined mainly by reference to two matters - the place of business of the parties and the subject matter of the contract.
- 38 The parties are to have their places of business in different States (and to know that fact in respect of the other party) and either
- those different States are Contracting States, or
  - the rules of private international law must lead to the application of the law of a Contracting State (art 1(1)).

It follows that, in terms of art 1(1)(a), unless the parties otherwise agree, a sales contract between businesses in Toronto and New York is subject to the Convention since both Canada and the United States are Contracting States. By contrast, a contract between businesses in Sydney and Dunedin is presently subject to the Convention only if, as required by art 1(1)(b), the contract is subject to the law of New South Wales or some other jurisdiction which is itself a Contracting State (or a territory within such a State).

- 39 It follows from the second application provision that, as in the example, the Convention is already able to apply to New Zealand international sales contracts - particularly those involving Australia and major European countries. In general it applies if the contract expressly says that it is governed by the law of one of those countries or if one of those countries has the closest connection with the subject matter of the contract. This is subject to the reservation, made by only a handful of States, against this means of application.
- 40 So far as the subject matter of the contract is concerned, the Convention does not attempt to provide a comprehensive definition of a contract for the sale of goods. Contracts for the supply of goods to be manufactured or produced are generally included while contracts preponderantly about the supply of labour or other services are not (art 3). The Convention expressly does not apply to consumer sales, sales by auction, sales on execution or otherwise by authority of law, and in



three areas where there is likely to be a particular regime - shares and negotiable instruments; ships and aircraft; and electricity (art 2).

- 41 As indicated, the substantive parts of the Convention govern only the formation of the sale contract and the buyer's and seller's rights and obligations arising from the contract. The Convention expressly states that it is not concerned with the validity of the contract or the effect which the contract may have on the property in the goods sold (art 4). The Convention also does not apply to the seller's liability for death or personal injury caused by the goods to any person (art 5). All those matters remain governed by the relevant system of law. The parties may be well advised to try to deal with them in the contract - to the extent they can.

#### INTERPRETATION

- 42 The Convention prescribes rules for the interpretation both of the Convention and of the statements and actions of parties to sales contracts.
- 43 One threat to uniform law stated in a Convention such as this is to be found in differing approaches to the interpretation of the law in the courts of different jurisdictions. The Convention itself attempts to meet that threat by providing special rules of interpretation. Article 7(1) provides that

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.

Courts in a number of jurisdictions have emphasised such matters when interpreting similar conventions. So Lord Wilberforce (quoting Lord Macmillan) called for an approach, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or English legal precedent, and on broad principles of general acceptance, *James Buchanan and Co v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141,152. See also for example the cases cited in Bianca 73-74. To that extent the first part of the direction in art 7(1) is not new. It repeats established practice. But it is well worth emphasising nonetheless, as appears from its inclusion in other uniform law conventions. It makes the practice binding on all courts resolving disputes about

the meaning of the Convention. And it strengthens the tendency seen in the cases. An important practical consideration (not limited to this Convention of course) is promoting knowledge of national court judgments on the law stated in the Convention. UNCITRAL is addressing that matter. That promotion of knowledge should help achieve consistent interpretation and remove or reduce uncertainties in the operation of the uniform rules. The major commentaries, listed in appendix E, are also an important help in that direction. We consider the third element of the paragraph - the observance of good faith in international trade - in chapter 3.

- 44 Article 7(2) goes on to deal with the problems of gaps in the text:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be 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.

The first part of this paragraph continues the emphasis on uniform, international rules. The answers to interpretation questions are to be found if possible within the Convention and its underlying principles. There is not to be too precipitate a reference to a national system of law. It is a last resort. Such an emphasis on principle is seen by some as being a civil law emphasis; on this analysis, the common lawyer by contrast would look for a precedent. Such a view appears to us to be a misleading caricature. As the statement by Lord Wilberforce indicates and much recent judicial practice relating to statutory interpretation confirms, courts in common law jurisdictions very often search for the principles underlying the legislation they are interpreting. That emphasis is to be found in particular in cases involving the interpretation of treaties where, as well, there is the widely accepted approach to the interpretation of treaties to be found in the provisions of the Vienna Convention on the Law of Treaties.

- 45 One of those provisions relates to the interpretation of multilingual treaties - a matter which is relevant here since, as the final paragraphs of the Convention indicate, it was signed in the six official United Nations languages and all are equally authentic. In accordance with the Vienna Convention art 33, multilingual texts are presumed to have the same meaning in each authentic text, and if there is a difference of meaning which cannot be otherwise resolved the meaning which

best reconciles the texts having regard to the object and purpose of the treaty is to be adopted.

- 46 One example shows how that approach can be used to elaborate the meaning of the text. The Convention often uses the phrase "place of business". In other contexts such as company law, this and similar terms present difficulties. For instance can an hotel room be a place of business when used by a company representative who sets up briefly to transact business? Generally, common law courts have required a degree of permanency. The existence of this requirement in the Convention is reinforced by the French and Spanish versions which use the term "établissement" and "establecimiento".
- 47 Another example arises from the exclusion, by art 2, of ships and vessels from the application of the Convention. Is a rowing boat a "ship" or "vessel" and therefore not covered? Perhaps it is not (although where is the line to be drawn) but some would say it falls within "bateau" in the French text, and, to anticipate the next point, the drafting history supports that wider reading.
- 48 The Vienna Convention on the Law of Treaties deals as well with the use of the drafting history of a treaty in interpreting it. That Convention recognises the use of that preparatory work and the circumstances of the conclusion of the treaty (a) to confirm the meaning of the text determined in other ways or (b) to determine the meaning if the basic approach to interpretation leaves the text ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. That drafting history might also facilitate the search for the "international character" and the "need to promote uniformity" as called for in art 7(1), para 43.
- 49 As noted in the report on *Arbitration* (NZLC R20 1991) para 205, such practices have also been adopted by courts in New Zealand and elsewhere. Professor John Honnold has now facilitated the process of using that material by publishing the documentary history in very convenient form, *Documentary History*. The commentaries make extensive use of the records. That material may in addition help a court determine the principles underlying the Convention for the purpose of art 7. We would however reiterate the proposition that

the user of the statute book should in general be able to place heavy reliance on it. Extended references to material beyond its text should not be common (*A New Interpretation Act* (NZLC R17 1990) para 126).

- 50 The Convention also gives directions on the interpretation of the statements and the conduct of the parties to the contract in issue. Its emphasis on fairness between the parties is evident in its provisions which are designed to ensure that effect is given to the intentions of the parties so far as they can be determined (arts 8 and 9). If actual intent cannot be determined then a "reasonable person" test is applied with reference to all the circumstances of the case. The provisions would permit access to virtually any type of evidence (eg negotiations and subsequent conduct) as long as it were relevant. The parties are also bound by any usage or practice to which they have agreed or which they have established themselves. As well they are subject to widely known and regularly observed relevant usages in international trade - unless of course otherwise agreed. Those usages are of enormous practical significance in many areas of international trade. Many have their origins in practices which began long before the preparation of uniform law conventions and indeed before the establishment of the modern State with its distinct legal system and separate commercial laws enacted as an expression of sovereignty, eg Berman "The Law of International Commercial Transactions (*Lex Mercatoria*)" (1988) 2 *Journal of Int Dispute Resolution* 235.

#### FORMATION OF CONTRACT

- 51 The rules in Part II of the Convention concerning the formation of a contract are in essence those of offer and acceptance. They do however differ in some respects from the law of New Zealand. For instance
- (a) an offer can be made expressly irrevocable,
  - (b) an offer is also irrevocable if it was reasonable for the offeree to rely on the offer as irrevocable and the offeree has acted in reliance on it,
  - (c) an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror; to that extent the postal acceptance rule would be abolished, and

- (d) a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer can constitute an acceptance rather than a counter offer.

52 Those changes appear to promote greater certainty and efficiency in international trade. (They might indeed be seen as attractive for local trade as well.) Thus (a) and (b) facilitate serious dealing; (c) removes the differences arising from different forms of communication and takes account of new technology; (d) avoids unnecessary steps where the original offeror acquiesces in the non-material variations and avoids the "battle of the forms". But, while none of the changes should present any difficulty or danger to those familiar with the new rules, care should be taken in respect of non-revocable offers; that change may be a trap for the unwary, see further paras 103-104.

53 The Convention addresses the definiteness of the offer and contract, a matter of some controversy in the preparation of the text. Article 14 (1) requires the offer to be "sufficiently definite". It has that quality if "it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and price". If that is a statement of the necessary (and not simply of sufficient) conditions then it appears to prevent open price contracts and related *quantum meruit* argument. In support of that, one eminent commentator has called attention to the insistence of some legal systems (including those of France and the USSR) that the price be either determined or objectively determinable at the time of the formation of the contract, Nicholas 212. That insistence might also be seen as going to the validity of the contract, a matter not covered by the Convention (para 41). But, as Nicholas also points out, art 55 may provide the answer. That provision reads:

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

That suggests that art 14(1) states only some of the conditions of definiteness. Furthermore, any relevant practice on usage applicable between the parties might fill any gap about price (art 9, para 50). See however paras 92-94.

#### OBLIGATIONS AND REMEDIES GENERALLY

54 Part II of the Convention, just considered, should answer the question: Is there a contract? If there is, Part III, now to be considered, deals with the parties' rights, obligations and remedies. Its five chapters set out in a systematic way

- general provisions applicable throughout the part (including provisions about remedies),
- the obligations of the seller and remedies for breach of those obligations,
- the obligations of the buyer and remedies for breach,
- the rules for the passing of risk,
- provisions common to the obligations of the buyer and seller.

The Convention sets out a unified set of rules to deal with the operation of the contract and achieving of the sale. Once again it emphasises the contract made by the parties. Thus the second and third chapters on the obligations of the parties each begin with parallel provisions; the parties must take the actions "required by the contract". As Professor Honnold says, it is not significant that the Convention mentions the contract. What is significant is the fact that the expectations of the parties (as shown by the language of the contract, the practices of the parties and applicable usages) are so consistently the theme of the Convention, *Uniform Law* 63.

55 The provisions on remedies give special weight to the characteristics of international sales, including the costs of transport, the complications of distance, and the problems of handling rejected goods in a foreign country. The rules emphasise saving the contract, for instance by narrowly defining fundamental breach, and by enabling the seller to cure the breach. An aggrieved party facing non-performance can also fix a final, additional reasonable period of time for the

party at fault to perform, a borrowing of *Nachfrist* from German law (paras 63(d), 67(b) and 117). Default beyond that period is a ground for avoidance.

- 56 The emphasis on saving the contract is also to be seen in the relatively narrow definition of fundamental breach; only such a breach or failure to comply in the extended time just mentioned can justify avoidance of the contract. A breach is fundamental, according to art 25,

if it results in such detriment to the other party as substantially to deprive him of what he is entitled to 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.

"Fundamental breach" under the Convention is quite distinct from the concept with the same name under English law: that concept was developed to enable an aggrieved buyer to escape contractual provisions denying the buyer's rights. By contrast the Convention uses the phrase primarily as the central element of the right to declare the whole contract avoided (arts 49(1)(a) and 64(1)(a); see also arts 46(2), 51(2), 70, 72 and 73).

- 57 Part III also of course reflects broader characteristics of the Convention as a whole; it is a document which is intended to be durable, it is the product of very extensive international collaboration, and accordingly it is flexible, capable of development (through the application and interpretation of courts around the world; and business practice which is free to exclude or vary it), and free of "the awesome relics from the dead past that populate in amazing multitude the older codifications of sales law, an unromantic place" (Rabel, "The Hague Conference on the Unification of Sales Law" (1952) 1 Am JI Comp L 58, 61).

#### OBLIGATIONS OF THE SELLER AND RELATED REMEDIES

- 58 The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and Convention. That basic set of obligations and the related remedies are spelled out in the three sections of chapter II.

59 Section I (arts 31-34) regulates the delivery of the goods and the handing over of documents. According to a leading English commentator, these relatively detailed articles do not seem likely to cause difficulty for English lawyers (Nicholas 220). As noted, the transfer of property in the goods in accordance with the sales contract is not regulated by the Convention, art 4, para 41.

60 The basic obligation in section II (arts 35-40) on conformity of the goods is that

The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (art 35(1))

Conformity is spelled out in terms of fitness for ordinary purpose and for any particular purpose known to the seller, unless the buyer did not reasonably rely on the seller's skill and judgment. The wording of the obligations differs from the Sale of Goods Act 1908 - there is no talk of conditions and warranties for instance - but the substance appears not to differ in any significant way.

61 The rules relating to the consequence of non-conformity are however new. They are the result of major contention at Vienna in the preparation of the text, contention resulting from differences in national law and national interests. The buyer loses the right to rely on a lack of conformity of the goods unless notice is given

(a) within two years of the actual handover of the goods (unless there is a contractual guarantee fixing a different time which might be longer or shorter), or

(b) within a reasonable time after the discovery of the lack of conformity

whichever is the earlier (art 39; see also arts 40 and 44).

62 The seller is also under a general obligation to deliver goods free of any right or claim of a third party including intellectual property rights (arts 41 and 42). Again the buyer loses the right to rely on those obligations of the seller by failing to give notice within a reasonable time of knowledge of the defect. In this area there is no outer time limit (art 43). If the buyer has a reasonable excuse for not giving the notice required by the provisions in respect of conformity and third



party rights, the buyer may reduce the price in accordance with the remedy provisions (considered next) or claim damages (except for loss of profit) (art 44).

63 The buyer's remedies include and extend beyond those available under the present law. The Convention first sets out rights to compel performance and later deals with damages (paras 74-76):

- (a) The buyer can require the seller to perform the contractual obligations (art 46(1)). That right, like others relating to required performance, is subject to the qualification that a court is not bound to enter a judgment for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by the Convention (art 28).
- (b) The buyer can require the delivery of substitute goods in a case of non-conformity involving a fundamental breach and if timely notice is given (art 46(2)).
- (c) The buyer can require repair in the case of non-conformity unless this is unreasonable, again if timely notice is given (art 46(1)).
- (d) As noted, the buyer (and the seller too) may fix an additional, reasonable time for the other party to complete the contract (arts 47 and 63).
- (e) The buyer may declare the contract avoided if the seller's failure is a fundamental breach, or in a case of non-delivery the seller does not deliver the goods within the period fixed in terms of (d) or declares that it will not do that (art 49, see also art 51). Again the seller has parallel rights in the event of fundamental breach or failure to comply with the notice by the buyer (art 64).
- (f) The buyer may reduce the price in the case of non-conformity (art 50).

64 The seller has, in parallel to (b) and (c), a right to cure any deficiency in performance, before or after the time fixed for performance (arts 37, 48). The

latter right is subject to reasonableness limits - of time, convenience and certainty - and to the right to damages.

- 65 The Convention also regulates partial and excessive performance (arts 51-52). Those provisions differ in detail from existing law (which in its English manifestation has been widely criticised). They are part of a broader set of provisions designed, as indicated, to remove impediments to trade and to help preserve the contracts covered by the Convention. For instance a shortfall in quantity can justify a declaration of avoidance by the buyer only if the failure is a fundamental breach of the contract and in the case of excess performance only the excess can be rejected. By contrast, the Sale of Goods Act s 32 allows the buyer to reject the *whole* delivery in either case.

#### OBLIGATIONS OF THE BUYER AND RELATED REMEDIES

- 66 The basic obligation of the buyer is of course to pay the price for the goods and take delivery of them as required by the contract and the Convention (art 53). The Convention provides for the determination of the price when it has not been fixed or according to weight (arts 55-56 and para 53) and for the place and time of the payment (arts 57-59).
- 67 The seller's remedies again are divided into specified rights and damages (considered later, paras 74-76). The specified rights are
- (a) to require the buyer to pay the price, take delivery and perform its other obligations (art 62),
  - (b) to fix an additional period for performance (art 63, para 63(d)),
  - (c) to declare the contract avoided for fundamental breach or non-compliance with the requirement under (b) (art 64, para 63(e)).
- 68 The Convention gives a further remedy to the seller if the buyer fails, in breach of the relevant contract, and following reasonable notice, to specify the form, measurement or other features of the goods. The seller can make a specification which becomes binding if the buyer does not make a different specification within a reasonable time (art 65). This provision has to be related to the obligation of the

party to mitigate the loss resulting from the breach the party is relying on (art 77, para 74).

#### THE PASSING OF RISK

- 69 The risk in general passes from the seller to the buyer at the time of the handing over of the goods to the first carrier (art 67). The risk in respect of goods sold in transit passes at the time of the conclusion of the contract (art 68). And in other cases the risk passes when the buyer takes over the goods or the goods are placed at the buyer's disposal (art 69). (But of course parties in New Zealand often separate these elements.) The Convention departs from the general rule in the Sale of Goods Act that risk passes with title. The Convention does not regulate transfer of title but clearly identifies the decisive facts which enable the parties to determine the appropriate arrangements including insurance. The parties can of course agree to a different arrangement and the relevant trade usage may also lead to a different result (arts 6 and 9, eg para 90).

#### PROVISIONS COMMON TO THE OBLIGATIONS OF SELLER AND BUYER

##### *Exemption - Impossibility*

- 70 While chapter V deals mainly with remedies, arts 79 and 80 deal with exemptions arising from impossibility and breach by the other party. Article 79 deals with the very difficult issue of the excusing of a non-performing party because of impossibility or some such cause. Paragraph (1) of that provision states the basic rule:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

The article operates however only to prevent an action in damages (see art 79(5)). It does not bring the contract to an end. However, if a failure to perform is a fundamental breach, the other party may declare the contract avoided.

71 The article was difficult to prepare and has since given rise to criticism. For instance the wording is vague and imprecise. One commentator has called on national courts to see the provision in the context of both the Convention as a whole and the practices of international trade. The more sophisticated and widespread international commerce becomes, the more difficult it is to say that a party could not reasonably have been expected to take the particular impediment into account (B Nicholas in Galston 5-14).

72 Article 80 states the basic proposition that

A party may not rely on failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

It can be seen as a particular manifestation of good faith. Its relationship to other provisions in the Convention including art 79 and those concerning remedies is also the subject of some controversy, eg *Uniform Law* 553-556, Bianca 596-600.

#### *Anticipatory breach*

73 A party faced with the prospect of failure to perform by the other party may be able to suspend the performance of its obligations or declare the contract void. The suspension right arises if "it becomes apparent" that the other party will not perform "a substantial part" of its obligations as a result of (a) a serious decline in its ability to perform or creditworthiness or (b) its conduct under the contract (art 71). The right to avoid for anticipatory breach arises if "it is clear that one of the parties will commit a fundamental breach" (art 72).

#### *Damages*

74 The basic right to damages is stated in terms of foreseeability:

Damages for breach of contract by one party consist of a sum equal to the loss, including the loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract (art 74).

That appears to conform with the basic rule of damages in *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 45 - a rule which we emphasised in reports last year

on aspects of damages (NZLC R18 and R19). We have already noted the obligation of a party relying on breach to mitigate the loss (art 77, para 68).

75 The Convention also states two special rules for damages after avoidance of the contract - where the buyer has bought goods in replacement or the seller has resold; and where there has been no such purchase or resale (arts 75-76).

76 A party is entitled to interest from the party who has failed to pay the price or any other sum that is in arrears (art 78). The Convention provides no basis for the calculation of interest.

#### *Effect of avoidance*

77 When a contract is avoided

- the parties are relieved of their contractual obligations subject to payment of damages,
- the contract remains binding to the extent of its provisions for dispute resolution or matters consequent upon avoidance,
- restitution of goods delivered or money paid may be claimed,
- the buyer must account to the seller for all benefits received from the contract goods,
- the seller must pay interest on any price refund. (arts 81, 84)

78 A buyer may not avoid a contract unless restitution of the goods delivered can be made, but other remedies remain available (arts 82-83).

79 The party in possession or control of the goods must take reasonable steps to preserve them. Limited rights of sale apply where there is unreasonable delay in remedying the breach or where the goods are perishable or too costly to preserve (arts 85-88).

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### III

## The Convention in Practice

#### INTRODUCTION

- 80 This chapter discusses some of the principal legal issues arising in practice from the preparation and application of a contract for the international sale of goods. While the chapter emphasises the Convention, the main points considered arise even in the absence of the Convention.
- 81 That fact is to be balanced against the fact that some provisions of the Convention would introduce new law or appear to be complex. As well, the Convention provides a single body of widely accepted law which should be uniformly developed and interpreted and which would supersede in practice the sales law of many of the countries with which New Zealand trades. To the extent that the new law presents problems, they would relate just to that single conventional regime. That specific focus should reduce significantly the transaction costs arising from the present involvement with many other separate systems of law.
- 82 This chapter considers in turn some of the practical issues relating to
- the application of the Convention
  - the validity of the sales contract
  - the use of legal concepts
  - formation of contracts
  - third party rights
  - remedies

- force majeure
- exclusion and variation of the rules of the Convention.

#### APPLICATION

83 Whether the Convention applies to a particular contract turns first on the provisions of the Convention, briefly discussed in paras 31, 37-39, and second on the attitude of the parties - for they can exclude or vary its application. Here we consider three matters:

- the closest relationship test for the place of business, a central element in the first ground for application, under article 1(1)(a),
- the determination of the governing law of the contract - the second means of application of the Convention, under article 1(1)(b),
- the possibility of the *implied* exclusion by the parties of the rules of the Convention, if they are otherwise applicable.

Whether the parties *should* exclude or vary the application of the Convention is considered at the end of this chapter.

#### *Closest relationship test*

84 The "closest relationship" test of art 10 may be decisive for the application of the Convention where one or more of the parties have more than one place of business and especially where one of these is in the same State as that of the other party. The basic test in that case is the place of business which has the closest relationship to the contract and its performance having regard to the circumstances known or contemplated by the parties. Parties in this position should address the problem before contracting if the test appears difficult to apply in the circumstances. They might consider using the additional means of application provided by article 1(1)(b).

85 In cases of doubt the interpretation provisions may assist. We have seen that they favour recognition of the international nature of the contracts and the correct approach to interpretation may be expected to favour rejection of a precipitate reference to domestic law.

*Governing law*

86 If the parties have their places of business in different States which are not Contracting States, the Convention applies only if the rules of private international law lead to the application of the law of a Contracting State (article 1(1)(b)). That is to say, although the Convention is designed to minimise the relevance of different national legal regimes, it does not (and cannot) entirely remove their relevance. The proper law of the contract will always be relevant to matters such as the validity of the contract which are not dealt with by the Convention. It is also determinative where article 1(1)(b) is the only basis on which the Convention could apply. There is risk in entering into international transactions without identifying the proper law. The Convention removes some of those risks, especially when the businesses are in two different Contracting States. But if that is not so there may be risk and uncertainty. That can however be removed if the parties address the choice of law issue and expressly and clearly set out their agreement in the contract by way of a choice of law clause.

87 The rules of private international law of most jurisdictions will normally give effect to such a choice of law clause provided there is no breach of the public policy of any relevant jurisdiction. If a choice of law clause is used to attempt to circumvent non-derogable aspects of the State law (eg export bans), public policy will often require that the clause be avoided. Clauses which apply different law to different aspects of the contract and those which choose a law having no connection with either party may also fall under suspicion. But in general, the parties have considerable autonomy.

88 Subject to public policy considerations, a choice of law clause may also be used to exclude operation of the Convention (art 6). It may (again subject to matters of public policy) apply the law of any State in substitution.



- 89 Care should be taken with the drafting of the choice of law clause (or a clause taking advantage of art 6) if the intention is to exclude the Convention. So a simple reference to the law of New South Wales might properly be read as including the law stated in the Convention; it is after all expressly made part of the law of New South Wales. The provision might instead refer specifically to the local, domestic (or the internal, substantive) law of the jurisdiction in question and might as well expressly exclude the Convention, eg Kritzer 100-101 quoting a clause recommended by two American experts.

*Exclusion of Convention by implication*

- 90 Article 6 of course stresses the broad freedom of the parties. It was possible for the Convention to accord that freedom in part because of its limited scope; it does not regulate the validity of the contract, prejudice the rights of third parties, extend to consumer contracts or deal with product liability. It does nevertheless cover critical aspects of international commerce. Does art 6 mean that the rules on those aspects may be set aside merely by implication? Or is something more called for? The commentaries on the provision (which draw on its history) confirm the plain meaning - that art 6 does not require an express provision. But there is obviously considerable advantage in making the exclusion or modification express; in that event, the matter is clear, the particular governing law is likely to be identified by such a provision (with the consequent advantages of that course), and the history of the provision discourages too easy an inference of implied exclusion. The intention to exclude would be found by application of the interpretation provisions of the Convention, eg Bianca 51-52, 55-58. And some provisions of the Convention, such as those directions on interpretation, would be very difficult to exclude.

THE VALIDITY OF THE SALES CONTRACT

- 91 The Convention, we have noted several times, is not concerned with the validity of the contract. That proposition does not stand alone. Rather it appears as an explanation of the positive statement in art 4 that the Convention applies (only) to the formation of the contract and the rights and obligations of the buyer and seller

under it. That statement of the positive scope of the Convention gives some indication of what might be left to fall within the excluded range of "validity" issues.

- 92 Those possible issues are many: contractual capacity, mistake, export and import regulation, illegal and unconscionable contracts for instance. It will not always be clear whether a particular challenge relates to validity or to matters covered by the Convention. Open price contracts present an example. We have already noted that the definiteness requirement of art 14(1) might be softened somewhat by art 55 (para 53). But might there not be a *prior* argument that the contract is void and that accordingly those provisions do not begin to operate?
- 93 Professor Tallon refers to the French courts holding to be void, contracts providing for payment of the price usually charged for similar goods at the same place or providing for a tentative price, the actual price being that of the list price in effect at the time of delivery. The decisions, he says, might be justified by reference not only to the Civil Code but also to broader public policy considerations of the protection of a weaker party, Galston 7-11 to 12. The view might be taken that under French law this matter concerns the validity of the contract and not its formation and accordingly falls outside the scope of the Convention and any curative effect of art 55. The view in New Zealand might be the opposite. The determination of the law governing that issue may accordingly be decisive.
- 94 Parties contemplating a continuing arrangement for the supply of goods need to have regard to both the validity and definiteness issues if they are not intending to determine the price from the outset. They might have to give greater specificity to the means of and criteria for price determination. The international approach to interpretation demanded by art 7 (paras 42-50) may also help resolve the issue.

#### THE USE OF LEGAL CONCEPTS

- 95 Chapter 1 mentions the direct, practical and simple character of the Convention (para 25). That was a major consequence of the international collaborative process that was followed in preparing the text. Some familiar concepts and related legal expressions have disappeared as a consequence; risk passes (it is not

transferred) on the handing over or taking of the goods (not on their *délivrance* as under the 1964 Convention and not on *property* passing). Warranties and conditions make no appearance. And consideration too appears to be absent in some contexts when the common law might require it.

- 96 The Convention depends in important ways on standards such as reasonableness and good faith. They are of course familiar ideas and concepts. They can however suggest a lack of certainty and precision. They might be seen as undermining the terms of the contract as agreed between the parties and as threatening the security of international commerce. Those concerns cannot be answered in a completely comprehensive way. But two broad answers can be given, one relating to the powers of the parties, the other to the characteristics of law in this area.
- 97 The first is found in the parties' freedom, stressed in art 6 and emphasised elsewhere in the Convention, to write the contract in their own terms. They can displace any uncertainty with their own special law. The course of relations between the parties and relevant trade usages may also help achieve that greater certainty (arts 8 and 9).
- 98 The second set of answers to the concern recalls the parallel role of such standards in related areas of our law. Standards of reasonableness are of course common. They lie at the heart of obligations of due care. Similarly the Sale of Goods Act 1908 requires the payment of "a reasonable price" if none is fixed and no procedure for determining it exists (s 10(2)); see also ss 16 (reasonably fit for purpose), 36 (reasonable opportunity of examining), and 20, 31(3), 31(5), 37, 39 and 57 (all about "reasonable time" - a common feature of the Convention). Consider as well the broad standards and powers included in the contract statutes.
- 99 Statutory references to good faith are probably less frequent. It does of course have a prominent role, at least potentially, in the Convention (see art 7 quoted in para 43). But, again to take just the one example, the Sale of Goods Act uses it, as a synonym for honesty, in respect of the rights of third parties; ss 25, 48 and 2(2).

Again we have to keep in mind that the rules are international. They are not to be seen purely in a national context.

100 The requirement in art 7(1) that the Convention be interpreted to promote not only uniformity but also the observance of good faith in international trade represents a compromise. In Honnold's words:

(a) Some delegates supported a general rule that, at least in the formation of the contract, the parties must observe principles of "fair dealing" and must act in "good faith";

(b) Others resisted this step on the ground that "fair dealing" and "good faith" had no fixed meaning and would lead to uncertainty.

The text does not of course impose good faith as a distinct obligation of the parties. Rather it is solely to be used in interpreting the Convention. What does that add to the uniformity and principle directions in art 7? Professor Honnold has suggested possible uses, for instance in respect of the performance demanded within the additional reasonable period. Professor Schlechtriem links good faith to the frequent references to reasonableness, *Uniform Law* 147-148.

101 The broad standards in the Convention relate as well to two of its basic characteristics; it is intended to be durable, a base for vast international commercial activity; but a base which the parties are free to put to one side or to modify if they so desire (to return to the first point about the extensive freedom of the contracting parties, para 97); Kritzer 108-114.

#### FORMATION OF CONTRACTS

102 Some of the issues arising from open priced contracts have already been considered, paras 53, 92-94. Here we mention aspects of the Convention provisions relating to irrevocable offers and counter offers which are novel, novel that is to New Zealand lawyers.

103 Under New Zealand law an offer can be irrevocable only if the offeree has given consideration. If no consideration has been given, an offer which is expressed to be irrevocable can be revoked - subject now to the broad controls on misleading and deceptive conduct in the Fair Trading Act 1986. As noted in para 51, art

16(2) qualifies the general rule stated in art 16(1) that an offer may be revoked at any time up to the dispatch of the acceptance.

- (2) However, an offer cannot be revoked
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

104 It follows that an offer which is simply intended to lapse after a fixed time is likely to be interpreted under art 16(2)(a) as irrevocable because it states a fixed time. If that possibility is not intended, care should be taken in the drafting of the offer. The potential effect of art 16(2)(b) in respect of implied irrevocability could also be met by explicit drafting of the offer. But, depending on the circumstances, the commercial interests of the offeror might of course be enhanced by the greater certainty of dealing that arises from irrevocability. It is significant that the law of major trading countries including the United States and much of Europe is consistent in this respect with the Convention.

105 Under New Zealand law an acceptance which varies the terms offered is a counter offer, not an acceptance. Article 19 begins with that principle.

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

But it then goes on to qualify the principle.

- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, 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.

106 These two paragraphs recognise the fact that in many transactions the standard form used by the seller will differ from that used by the buyer. The law has to

attempt to deal with "the battle of the forms". The above provisions are designed to maintain the contract - in the absence of timely objection by the offeror - if the differences between the offer and "acceptance" are immaterial. As Honnold points out, although legal doctrine in many countries conforms with the principle stated in para (1) of art 19, there is evidence of courts upholding contracts by finding that the alleged deviation in the "acceptance" was not really inconsistent with the offer in the light of commercial practice or good faith, or was a request for a modification of an agreement, or had been waived by the proposer or accepted in silence by the other party. *Uniform Law 230*.

- 107 The new provisions in arts 19(2) and 19(3) do highlight the need for care in contract management - a need which is present now of course - and they help facilitate the formation and performance of contracts when the arguments against that course do not have real commercial merit.

#### THIRD PARTY RIGHTS

- 108 The Convention, to repeat, regulates the rights and obligations of the buyer and seller. "In particular" it is not concerned with the effect which the contract may have on the property in the goods sold (art 4(b)). That matter, including the rights of third parties, is essentially left to national legal systems (although there is the 1970 UNESCO Convention on the means of prohibiting the illicit import, export and transfer of ownership of Cultural Property; and UNIDROIT and the Commonwealth Secretariat are doing related work in that area and more broadly; and, on choice of law rules, there is a 1958 Hague Convention on the Law Applicable to the Transfer of Title in International Sale of Goods which has not yet come into force).
- 109 The parties should give attention to the time of the passing of property in terms of the relevant domestic law or the provisions in the contract. Relevant trade terms will often continue to govern the matter. That position is not directly affected by the Convention, although the significance of the passing of property is reduced by the Convention rules relating to the passing of risk - reduced, that is, for those legal systems which link the passing of risk to the passing of property. As already noted, under the Convention risk in general passes on the handing over of the

goods to the first carrier or to the buyer if it is taking direct delivery. That set of rules provides a clear basis on which relevant arrangements, including insurance, can be made, para 69.

- 110 Article 30 states the basic obligation that the seller "transfer the property in the goods ... as required by the contract and this Convention". Articles 41 and 42 spell that out. Under the former

The seller must deliver goods which are free from any rights or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim ... .

Article 42 makes more detailed provision for a third party right or claim based on industrial property or other intellectual property. Article 41 corresponds with the seller's obligation under s14 of the Sale of Goods Act, and appears to extend beyond it to "claims". Any departure from the obligation must be based on agreement and not merely on the knowledge of the buyer (which is sufficient in respect of industrial and intellectual property). The agreement, it is accepted, can be implied. There may nevertheless be obvious advantages in dealing with this matter expressly in the contract. Consider for instance the position of the buyer who must pay before goods are released from a warehouse or carrier.

- 111 The obligations of the parties to one another under art 42 depend on whether they knew or could not have been unaware of the right or claim of the third party based on their intellectual or industrial property. "Could not have been unaware" appears to be close to actual knowledge. It can be contrasted with "ought to have known" or "discovered" which is used in several other provisions of the Convention (such as art 39(1) on non-conformity). While the latter formula appears to impose a duty to investigate the former may not, eg *Uniform Law* 308. Compare similarly s 16(2)(b) of the Sale of Goods Act. Prudence might nevertheless dictate inquiry in some circumstances, and either party might be well advised to deal expressly with the issue where such rights or claims are likely.

## REMEDIES

- 112 Remedies are critical in the effective operation of law in an area such as this. It is not surprising that the Convention gives them a great deal of emphasis,

introducing, as already noted in chapter 2, a range of remedies not to be found in New Zealand law. There is already an extensive amount of relevant commentary, valuable to those who must work with the rules in the Convention.

- 113 The Convention provides a unitary set of remedies designed to take account of the special characteristics of international commerce and directed at preserving the contract if that is practicable.
- 114 The parties are free to adapt or even to supplant the Convention's remedies. One exercise of their contractual freedom might be to provide for methods of dispute settlement other than through the courts, for instance by conciliation, mediation or arbitration, on the last of which the Law Commission has recently reported, again on the basis of the relevant UNCITRAL text, *Arbitration* (NZLC R20 1991).
- 115 One major area of commentary and potential difficulty is "fundamental breach" (see also para 56). The definition would constrain the relative freedom of the buyer under New Zealand law to reject the goods (eg para 65). Again the parties may want to negotiate a more specific avoidance regime, but the Convention rules do have the advantage of preserving contracts where only minor irregularities in performance occur - subject still of course to a right to damages and to the giving of relevant notices (see para 117).
- 116 Uncertainty about the application of the fundamental breach definition in a particular case also can be avoided by making use of the reasonable notice (*Nachfrist*) provision (para 55). The relevant constraint there on the aggrieved person's power of avoidance of the contract is that the extra time allowed must be reasonable. Calculating that period is probably easier than assessing the fundamental character of the breach.
- 117 Remedies may also be lost if timely notice is not given - for instance of non-conformity, avoidance, defect in documents, and third party claims. These requirements are to be explained by the need for greater certainty in the international context. New Zealand businesses will need to ensure that their contract management procedures are such that rights are not lost through a failure to give that notice.



## FORCE MAJEURE

- 118 The earlier comment on art 79 about impossibility of performance calls attention to the problems in the preparation and in the likely interpretation of this provision and also its limited effect; it prevents only an action in damages and does not affect other remedies (paras 70-71). It will also be recalled that the law regularly applied in granting specific performance by the court in question is to be applied in respect of international sales as well (art 28, para 65). Accordingly the not uncommon reluctance of courts in the common law tradition to grant that remedy may give greater scope in practice to art 79; see further *Uniform Law*, 551-552.
- 119 Some comfort may also be drawn from the comment by Professor Nicholas that similar problems of the verbal statement of the rule and its actual application are present in most major legal systems. The formulations found in these systems are no more helpful than those in art 79. He puts the view of another expert in these words; there are always some who hope that by multiplying words they may succeed in defining the undefinable and others, like himself, who know that this is futile, Galston 5-10. Once again if the parties to a particular arrangement can be sufficiently far sighted and can agree, they might be able to avoid some of the difficulties arising from art 79 (as from similar national doctrines) by specific terms in their contract.

## EXCLUSION AND VARIATION OF THE RULES OF THE CONVENTION

- 120 Professor Honnold was quoted earlier as emphasising the significance of the fact that the expectations of the parties are constantly the theme of the Convention (para 54). They have very broad powers to vary or even displace the rules in the Convention. They might do that through their own contract or because of the particular or general usages relating to their trade (arts 6, 8, 9).
- 121 Standard terms have been developed for use with particular goods (especially for commodities such as wool, grain or sugar). For more general use, terms such as FOB (free on board) and CIF (cost, insurance, freight) have evolved. Used alone, the latter terms rely largely on the common law for definition. The International Chamber of Commerce has taken these terms, revised them and published a set of

standard definitions known as INCOTERMS (last revised 1990). The ICC definitions specify, for each term, the respective obligations of buyer and seller in matters such as export licences, type of insurance, cost of insurance and port of shipment. Thus, the term "FOB (Incoterms, 1990)" would import the relevant standard obligations into the contract rather than the common law understanding. This could be subject to any usage that has developed in the particular trade or region or between the parties.

- 122 Standard terms such as INCOTERMS do not however generally define the whole contract. For instance remedies are not normally covered. A contract could therefore be constructed by employing a trade term to define transactional arrangements with the Convention providing the supporting law (including remedies). To the extent that the trade term displaces the default rules of the Convention (such as the definition of the place at which delivery is to occur) the incorporation will modify the Convention. Since the remedial provisions have been, in part at least, tailored to those default rules there is a possibility that the modification will upset the fit between obligation and remedy for its breach.
- 123 Under art 49, avoidance is immediately available for fundamental breach. If a breach of a particular element of the transaction would not amount to fundamental breach under the default rules of the Convention, but can be seen as fundamental under the trade terms used, then the effect of incorporation of the trade term may have unexpected results. It is not suggested that the use of trade terms should be discouraged - they obviously have great value in facilitating trade - but rather that the parties' contract be adjusted if necessary to take account say of the remedies in the Convention. No doubt those preparing and revising standard terms will also have regard to the relevant provisions of the Convention.
- 124 Parties considering departure from the terms of the Convention have to consider competing considerations. On the one side they have the great advantage of the widely accepted and increasingly understood text. Using that text can avoid major difficulties which would otherwise arise during negotiation (which law should apply? what specific obligations and remedies should be created?). It gives the parties immediate access to the developing interpretation of the standard text, familiar to commerce around the world. They have the advantage of that

unified law. But for very understandable reasons they may wish to write their own law, to supplement where there are gaps or obscurities and to displace where the law is not satisfactory for their purpose. They should assess the advantages which they foresee in their special arrangement against the values (including the growing certainties) of the uniform rules in the Convention.

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## IV Accession by New Zealand

### NEW ZEALAND SHOULD BECOME PARTY TO THE CONVENTION

125 The Law Commission supports the Government's intention to accede to the Convention, without reservations, and to promote legislation making the rules set out in the Convention part of the law of New Zealand. The reasons for that support relate, first, to the wide and growing acceptance of the Convention and, second, to its substance.

#### *Wide acceptance*

126 States which participate in more than half of New Zealand's external trade have already become parties to the Convention. The 34 Contracting States include Australia; the United States and Canada; France, Germany, Italy, the Netherlands and Spain; Switzerland; the Russian Federation; and China. Accordingly, the uniform rules set out in the Convention already apply to trade between parties whose businesses are in any two of those States, and, in addition, to international trade if the relevant contract is governed by the law of one of those States (if the places of business of the parties are in different States, whether Contracting States or not). That additional ground for the application of the rules can be excluded by reservation by the Contracting State, but only China, Czechoslovakia, the United States and Canada in respect of British Columbia have taken that action. The increasing rate of acceptance of the Convention is also significant. It took nearly eight years for the Convention to come into force, once 10 states had accepted it. In the following four years the number of States bound by it has trebled. They participate in about 60 percent of world external trade. Also significant, to refer to the preamble to the Convention, is the range of countries with different social, economic and legal systems to be found among the Contracting States - three important common law countries, five member States of the European

Community, the Russian Federation (the USSR) and China, and other States from all continents and all major legal systems. It is however significant that important trading partners in South East Asia are not yet Contracting States. This is a matter that might be further addressed, for instance through governing law provisions in contracts and perhaps persuasion of those States to consider accession.

127 There are two further features of the list of Parties (in addition to their great importance for New Zealand trade) that should be stressed. One is that the second ground for the application of the Convention - that the contract of sale is governed by the law of a Contracting State - means that the uniform rules set out in it already apply to much New Zealand trade. The Convention applies to an international sales contract to which a New Zealand firm is party if the contract is governed, for instance, by the law of Victoria, Bavaria or Ontario. It follows that New Zealand firms engaged in international trade and their lawyers should *already* be familiar with the Convention and its developing interpretation and application.

128 Another significant feature of the list of Contracting States is that Australia has been bound by the Convention since 1 April 1989. Nearly 20 percent of New Zealand's external trade is with Australia. This figure has grown substantially (especially in terms of New Zealand exports) in recent years in the context at first of the New Zealand Australia Free Trade Agreement of 1965 and later of the Closer Economic Relations - Trade Agreement of 1983. The 1983 Agreement declares that its objects are:

- to strengthen the broader relationship between Australia and New Zealand;
- to develop closer economic relations between the member states through a mutually beneficial expansion of free trade between New Zealand and Australia;
- to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and

- to develop trade between New Zealand and Australia under conditions of fair competition.

129 Major steps have since been taken in accordance with the Agreement to remove or greatly lessen the standard barriers to trade such as tariffs, quotas, subsidies, and bounties. In 1988 the two Governments gave attention as well to the harmonisation of business law. "Differences in the laws and regulatory practices relating to business may impede the enhancement of [the closer economic relationship]," they said, "by inhibiting the creation of an environment conducive to the growth of trade in goods and services and the efficiency of both economies." Accordingly, the two Governments set up a process to examine the removal of any impediments to trade that may arise out of differences between the business laws and regulatory practices of the two countries.

130 In terms of that agreement, officials of the two Governments examined areas of law and practice in which "harmonisation" might be considered. In their June 1990 report to Ministers the officials addressed a "key harmonisation issue ... the law which applies to the sale in one country of goods produced in the other". Australia had acceded to the Sales Convention with effect from 1 April 1989. New Zealand, they reported, was considering accession. The differences between the Convention and the general law applicable in the two countries led to discussions whether Australia should make a declaration under art 94(2) in relation to New Zealand providing for a special regime to operate between them (see para 34). But, the report continues, Australia concluded after careful consideration that international uniformity should be encouraged, even between neighbours such as Australia and New Zealand. The consequence is that, as indicated, the Convention continues to apply to a substantial proportion of trans-Tasman trade even without New Zealand accession. The report records the agreement of New Zealand officials, the Minister of Justice and the Law Commission that New Zealand should accede. Two reasons are given - the elimination of confusion and uncertainty about the applicable law governing trans-Tasman trade, and, having regard to the growing number of Contracting States, the contribution to the development of international uniformity in this important area of commercial law (Report to Governments by Steering Committee of

Officials, Australia New Zealand Closer Economic Relations - Trade Agreement, Memorandum of Understanding between the Government of Australia and the Government of New Zealand on Harmonisation of Business Law (June 1990) paras 12.01 - 12.06).

- 131 We make three points about the result of this process. The answer in this case is uniform law, and not merely an approximation or harmony. The answer is multilateral ("international") rather than bilateral. And the commitments already given within the CER process probably mean that the question is really no longer whether New Zealand should accede, but when.

*The substantive rules*

- 132 The facts about acceptance just mentioned are probably in themselves decisive for New Zealand accession to the Convention. A large amount of New Zealand's external trade is subject to the rules in the Convention (and will probably be increasingly so) and at best it is inconvenient for much other trade to be subject to many separate sets of rules which may or may not be the law of New Zealand. There is also the fact that New Zealand law will no longer be able to draw on developments in major common law jurisdictions in the way it traditionally has, given that the rules in the Convention now apply in those countries - unless of course New Zealand has itself accepted the Convention.
- 133 The facts about acceptance also show that a significant number of important trading nations have judged the substance of the rules to be satisfactory. To refer back to the preamble to the Convention, they see the rules as contributing to the removal of legal barriers in international trade and as promoting the development of international trade; Babel has been avoided. The Law Commission's study, reflected in chapters 2 and 3, leads it to the same conclusion. The complex, uncertain conflict of laws rules and the whole range of the separate bodies of law to which they direct attention will be replaced in most situations by a uniform system of rules which balance certainty and flexibility in the ways briefly indicated. The reform would be a particular instance of the principle stressed in

the Law Commission Act 1985 of making the law as accessible and comprehensible as practicable.

- 134 The Convention should also reduce the costs and uncertainties for New Zealand businesses engaged in international commerce. They will often be smaller and have less bargaining power than the foreign businesses with which they trade. They may as a consequence undertake to do more of their trading under foreign laws and may suffer greater cost as a result (if only the extra cost of getting advice on that foreign law). Were New Zealand to become a Contracting State more transactions would be governed by the Convention. Using the Convention as the governing law removes the advantage that the other trading partner has when the contract is subject to its familiar local law. The Convention law is equally accessible regardless of geographic location.
- 135 There will as well be the savings for New Zealand businesses in the application of their growing understanding of the rules in the Convention which they should in any event be obtaining to a wider range of their external trade. They can accordingly be less worried about the potential or actual application of the law of Australia or Argentina, Iraq or Italy, Connecticut or Hessen. There will be a uniform widely applicable set of rules the application and interpretation of which will be clarified and developed over time by the courts and authorities of a great number of States.
- 136 That process of clarification and development helps meet the concerns that can legitimately be expressed about the difficulties arising from the text of the Convention and from the changes it would introduce into our law. Every law has its complexities and the Convention has the advantage over most foreign law that it is fully accessible in New Zealand. The fact that most of our largest trading partners are already Contracting States not only increases the pressure for accession, but enhances the benefits arising from it.
- 137 Accordingly, the Law Commission is strongly of the opinion that New Zealand should become party to the Convention. As a non-signatory to the Convention it can become bound by the Convention by acceding to it, effective on the first day



of the month 12 months after the deposit of its instrument of accession with the Secretary-General of the United Nations (arts 91(3) and 99(2)).

138 The Law Commission does not propose that the Government makes any reservations on accession (see paras 29-36). Only one possible reservation need be discussed here. Four States have limited the application of the Convention to situations where the two parties to the contract are in different Contracting States. That is to say, they exclude the possibility of the Convention applying simply because the law of a Contracting State governs the contract (art 1(1)(b)). The states are Canada (in respect of British Columbia), China, Czechoslovakia and the United States. We noted earlier the British Columbia legislation which will enable the reservation in respect of that province to be withdrawn, para 31. The United States has given two reasons for this position. (See US Senate 98th Congress 1st Session, Treaty Doc No 98-9; also in Galston app I). The first is that the rules of private international law on which applicability under art 1(1)(b) depends are subject to uncertainty and international disharmony. That is true. But the uncertainty and disharmony can almost always be avoided by an express choice of law clause in the contract. And if there is no such choice of law clause exactly the same problem of determining that law arises if the Convention does not apply. If it does not apply and foreign law does there may then be the additional problems which arise from reference to a foreign legal system.

139 The second United States argument relates to that prospect of the application of foreign law. Article 1(1)(b), it contends, would displace United States domestic law more frequently than foreign law. It is true that United States *domestic* law will be displaced if the proper law is American - but by the Convention with its advantages. If the proper law is the law of the foreign non-Contracting State where the other party has its business then that law will apply whether art 1(1)(b) is in effect or not. The associated United States argument is that its relevant domestic law, the Uniform Commercial Code, is relatively modern and includes provisions that address the special problems that arise in international trade. That comment cannot be made about the New Zealand sales law. It is essentially the United Kingdom Act enacted 99 years ago. The United States argument also refers first to the fact that, with the increasing acceptance of the Convention,

article 1(1)(a) will in any event have wider application (and article 1(1)(b) would be less significant anyway), and, secondly, to the freedom of the parties to contracts not covered by article 1(1)(a) to provide by their contracts, that the Convention will apply. That freedom also of course can be invoked to make the Convention inapplicable.

- 140 The Commission is also influenced by the fact that 30 of the 34 Contracting States have not made the reservation. Accordingly it does not propose a reservation in respect of art 1(1)(b). To repeat, the New Zealand Government should accede to the Convention, without any reservations. That executive action is not however sufficient to change the law of New Zealand. As well, Parliament must enact appropriate legislation.

#### PARLIAMENT SHOULD ENACT IMPLEMENTING LEGISLATION

- 141 The relevant statutes enacted in other common law jurisdictions, for instance in the Australian states and territories and Canadian provinces, are very simple. Their form confirms that it is enough for Parliament to enact a Sale of Goods (United Nations Convention) Act to the following effect:

- the rules in the Convention, scheduled to the Act, are part of the law of New Zealand;
- the Act comes into force when New Zealand becomes bound by the Convention;
- the Crown is bound by the Act;
- the Secretary of External Relations and Trade can give certificates (which have presumptive effect) about the Contracting States' treaty actions under the Convention.

The statute could also provide that the parties to a contract to which the Convention would otherwise apply can exclude or vary that application. But article 6 already says that and this is a case in which the Convention should be fully part of the law of New Zealand without any statutory gloss which might

stand in the way of uniform interpretation of the law the Convention states; see the similar comment by Professor Ziegel about the Canadian provisions, "Canada Prepares to Adopt the International Sales Convention" (1991) 18 Can Bus LJ 1, 3-4. The same reasoning has led to the conclusion that the statute should not provide that it prevails over other relevant law. Once again the Convention should be left to speak for itself in its general treaty context; and indeed article 90 indicates that the Convention does *not* prevail over other international agreements dealing with the same matter.

- 142 By its very terms however the proposed Act will derogate in part from the Sale of Goods Act 1908 and other law, including common law, governing the sale of goods falling within its Part I. That domestic law is based on an aged model as is recognised by the Consumer Guarantees Bill now before Parliament which would supersede it for consumer transactions. The Convention is of course not concerned with consumer transactions. However, the question arises whether it should extend to those other internal sales which will remain covered by the Sale of Goods Act. (See eg *Uniform Law* 58-59.) The Convention takes a more practical approach than the older model, rejects some unnecessary concepts and introduces a more flexible range of remedies. Some aspects of the Convention may prove inappropriate in a domestic context and provisions which may have suffered through the need for compromise might be rejected in favour of provisions more suited to local conditions and practices. While this type of review would not be a necessary consequence of New Zealand's accession to the Convention, a degree of parallelism between the laws for international and domestic transactions is attractive. Should a manufacturer shipping goods from Whangarei be in a different legal position depending on whether the purchasing wholesaler is in Wellington, Wollongong or Wilmington? That question can be left for later consideration. In the meantime, the Law Commission recommends that legislation to the effect outlined in para 141 be enacted to facilitate New Zealand's accession to the Convention.

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# APPENDIX A

## UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The six official language versions of the Convention text appear in UN document A/Conf. 97/18 and are reproduced in *Documentary History* and (with German and Italian translations) in Bianca.

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*[This table is not part of the Convention and is included for convenience]*

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**UNITED NATIONS CONVENTION ON CONTRACTS FOR THE  
INTERNATIONAL SALE OF GOODS**

*The States Parties to this Convention,*

*Bearing in mind* the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

*Have agreed* as follows:

PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

CHAPTER I. SPHERE OF APPLICATION

*Article 1*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (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.

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

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

*Article 2*

This 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 nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

#### *Article 3*

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

#### *Article 4*

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

#### *Article 5*

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

#### *Article 6*

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

## CHAPTER II. GENERAL PROVISIONS

### *Article 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.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be 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.

### *Article 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.

### *Article 9*

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage 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.

### *Article 10*

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### *Article 11*

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

#### *Article 12*

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

#### *Article 13*

For the purposes of this Convention "writing" includes telegram and telex.

### PART II. FORMATION OF THE CONTRACT

#### *Article 14*

- (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.

#### *Article 15*

- (1) An offer becomes effective when it reaches the offeree.
- (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

#### *Article 16*

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

#### *Article 17*

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

#### *Article 18*

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
- (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
- (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

#### *Article 19*

- (1) A reply to an offer which purports to be an acceptance but contains additions, 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 contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, 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.

#### *Article 20*

- (1) A period of time for acceptance fixed by the 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 the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

- (2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

#### *Article 21*

- (1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
- (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

#### *Article 22*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

#### *Article 23*

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

#### *Article 24*

For the purposes of this Part of the 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 personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

### PART III. SALE OF GOODS

#### CHAPTER I. GENERAL PROVISIONS

#### *Article 25*

A breach of contract committed by one of the parties is 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.

#### *Article 26*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

#### *Article 27*

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

#### *Article 28*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

#### *Article 29*

- (1) A contract may be modified or terminated by the mere agreement of the parties.
- (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

## CHAPTER II. OBLIGATIONS OF THE SELLER

#### *Article 30*

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

### SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

#### *Article 31*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
- (c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

*Article 32*

- (1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
- (2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.
- (3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

*Article 33*

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

*Article 34*

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

## SECTION II. CONFORMITY OF THE GOODS AND THIRD PARTY CLAIMS

### *Article 35*

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
  - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
  - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
- (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

### *Article 36*

- (1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.
- (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

### *Article 37*

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.



### *Article 38*

- (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

### *Article 39*

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

### *Article 40*

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

### *Article 41*

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

### *Article 42*

- (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
  - (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of

the contract that the goods would be resold or otherwise used in that State;  
or

- (b) in any other case, under the law of the State where the buyer has his place of business.
- (2) The obligation of the seller under the preceding paragraph does not extend to cases where:
- (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
  - (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### *Article 43*

- (1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.
- (2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### *Article 44*

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### *Article 45*

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
  - (a) exercise the rights provided in articles 46 to 52;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### *Article 46*

- (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

- (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
- (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### *Article 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.

#### *Article 48*

- (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
- (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
- (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
- (4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

#### *Article 49*

- (1) The buyer may declare the contract avoided:
  - (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract;or

- (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
- (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
  - (b) in respect of any breach other than late delivery, within a reasonable time:
    - (i) after he knew or ought to have known of the breach;
    - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
    - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

#### *Article 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. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

#### *Article 51*

- (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.
- (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### *Article 52*

- (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.
- (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess

quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### CHAPTER III. OBLIGATIONS OF THE BUYER

#### *Article 53*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### SECTION I. PAYMENT OF THE PRICE

#### *Article 54*

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

#### *Article 55*

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.

#### *Article 56*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

#### *Article 57*

- (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
  - (a) at the seller's place of business; or
  - (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.
- (2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### *Article 58*

- (1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this

Convention. The seller may make such payment a condition for handing over the goods or documents.

- (2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.
- (3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### *Article 59*

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

### SECTION II. TAKING DELIVERY

#### *Article 60*

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

#### *Article 61*

- (1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
  - (a) exercise the rights provided in articles 62 to 65;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### *Article 62*

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

#### *Article 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.

#### *Article 64*

- (1) The seller may declare the contract avoided:
  - (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
  - (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
  - (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
    - (i) after the seller knew or ought to have known of the breach; or
    - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

#### *Article 65*

- (1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.
- (2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer

fails to do so within the time so fixed, the specification made by the seller is binding.

#### CHAPTER IV. PASSING OF RISK

##### *Article 66*

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

##### *Article 67*

- (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.
- (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

##### *Article 68*

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

##### *Article 69*

- (1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.
- (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.
- (3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.



### *Article 70*

If the seller had committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

## CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

### SECTION I. ANTICIPATORY BREACH AND INSTALMENT CONTRACTS

#### *Article 71*

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

#### *Article 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.
- (2) If time allows, the party intending to declare the contract avoided must 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.

#### *Article 73*

- (1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a

fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

- (2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
- (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## SECTION II. DAMAGES

### *Article 74*

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

### *Article 75*

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

### *Article 76*

- (1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.
- (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

*Article 77*

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

SECTION III. INTEREST

*Article 78*

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

SECTION IV. EXEMPTIONS

*Article 79*

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
  - (a) he is exempt under the preceding paragraph; and
  - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effects on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

*Article 80*

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

## SECTION V. EFFECTS OF AVOIDANCE

### *Article 81*

- (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
- (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

### *Article 82*

- (1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
- (2) The preceding paragraph does not apply:
  - (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
  - (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
  - (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

### *Article 83*

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

### *Article 84*

- (1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.
- (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:
  - (a) if he must make restitution of the goods or part of them; or

- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

## SECTION V. PRESERVATION OF THE GOODS

### *Article 85*

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

### *Article 86*

- (1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.
- (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

### *Article 87*

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

### *Article 88*

- (1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.
- (2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

- (3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### PART IV. FINAL PROVISIONS

##### *Article 89*

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### *Article 90*

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

##### *Article 91*

- (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

##### *Article 92*

- (1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.
- (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

##### *Article 93*

- (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification,

acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
- (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

#### *Article 94*

- (1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.
- (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.
- (3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### *Article 95*

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

#### *Article 96*

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

#### *Article 97*

- (1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.
- (3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.
- (4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.
- (5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

#### *Article 98*

No reservations are permitted except those expressly authorized in this Convention.

#### *Article 99*

- (1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, 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, including an instrument which contains a declaration made under article 92.
- (2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.
- (3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964



Hague Formation Convention by notifying the Government of the Netherlands to that effect.

- (4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.
- (5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.
- (6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Convention, so as to ensure necessary co-ordination in this respect.

#### *Article 100*

- (1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.
- (2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

#### *Article 101*

- (1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.
- (2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

NOTES:

- 1 Details of signatories have been omitted.
- 2 The text above corrects an apparent error in the certified copy, the text of which reads as follows:

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

# APPENDIX B

## CONTRACTING STATES

(AS AT 9 JUNE 1992)

<i>Country</i>	<i>In Force</i>	<i>Territories (art 93)</i>	<i>Regional Agreement (art 94)</i>	<i>Partial application (art 92)</i>	<i>Art 1(1)(b) Operative?/ (art 95)</i>	<i>Writing requirement (arts 96, 12)</i>
Argentina	01/01/88				Yes	Yes
Australia	01/04/89	Excl the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands			Yes	
Austria	01/01/89				Yes	
Bulgaria	01/01/91				Yes	
Belarus (Byelorussia)	01/11/90				Yes	Yes
Canada	01/05/92	Incl Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories			Yes, except in respect of British Columbia (see note 1)	
Chile	01/03/91				Yes	Yes
China	01/01/88				No	Yes
Czechoslovakia	01/04/91				No	
Denmark	01/03/90	Excl the Faroe Islands and Greenland	Finland, Iceland, Norway and Sweden	Part II doesn't apply	Yes	

<i>Country</i>	<i>In Force</i>	<i>Territories (art 93)</i>	<i>Regional Agreement (art 94)</i>	<i>Partial application (art 92)</i>	<i>Art 1(1)(b) Operative?/ (art 95)</i>	<i>Writing requirement (arts 96, 12)</i>
Ecuador	01/02/93				Yes	
Egypt	01/01/88				Yes	
Finland	01/01/89		Denmark, Iceland, Norway and Sweden	Part II does not apply	Yes	
France	01/01/88				Yes	
Germany (see note 2)	01/01/91				Yes, but see note 3)	
Guinea	01/02/93				Yes	
Hungary	01/01/88		See note 4		Yes	Yes
Iraq	01/04/91				Yes	
Italy	01/01/88				Yes	
Lesotho	01/01/88				Yes	
Mexico	01/01/89				Yes	
Netherlands	01/01/93	Incl the Kingdom in Europe and Aruba			Yes	
Norway	01/08/89		Denmark, Finland, Iceland and Sweden	Part II does not apply	Yes	
Romania	01/06/92				Yes	
Russian Federation	01/09/91				Yes	Yes
Spain	01/08/91				Yes	
Sweden	01/01/89		Denmark, Finland, Iceland and Norway	Part II does not apply	Yes	
Switzerland	01/03/91				Yes	
Syrian Arab Republic	01/01/88				Yes	
Uganda	12/03/93				Yes	
Ukraine	01/02/91				Yes	Yes
USA	01/01/88				No	
Yugoslavia	01/01/88				Yes	
Zambia	01/01/88				Yes	

NOTES

- 1 The Government of British Columbia has reviewed the declaration made regarding art 1(1)(b) and the Attorney General Statues Amendment Act 1992 was introduced in the Legislative Assembly of British Columbia on 30 April 1992. The relevant provision of the Bill (s 13) reads: Sections 2 and 3 of the International Sale of Goods Act, S.B.C. 1990, c.20, are amended by striking out “, except subparagraph (1)(b) of Article 1 of the convention).
- 2 The Convention came into force in the former German Democratic Republic of Germany on 01/03/90 under its earlier ratification.
- 3 In its instrument of ratification of 21/12/89, the Federal Republic of Germany made the following declaration:  
The Government of the Federal Republic of Germany holds the view that parties to the Convention that have made a declaration under Article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (1)(b) of Article 1 of the Convention. Accordingly there is no obligation to apply – and the Federal Republic of Germany assumes no obligation to apply – this provision when the rules of private international law lead to the application of the law of a party that has made a declaration to the

effect that it will not be bound by subparagraph (1)(b) of Article 1 of the Convention. Subject to this observation, the Government of the Federal Republic of Germany makes no declaration under Article 95 of the Convention.

4 The instrument of ratification made by the Republic of Hungary on 16/06/83 included the following declaration:  
[The Hungarian People’s Republic] considers the general conditions of delivery of goods between organisations of the member countries of the Council for Mutual Economic Assistance/GCD CMEA 1968/1975, version of 1979 to be subject to the provisions of Article 90 of the Convention ...

## APPENDIX C

### WORLD EXTERNAL TRADE STATISTICS (YEAR ENDED JUNE 1989)

<i>Contracting State</i>	<i>Total (US\$million)</i>	<i>Total (as % of world trade<sup>1</sup>)</i>
Argentina	13745	0.22
Australia	16671	1.25
Austria	71302	1.16
Bulgaria	30895	0.50
Belarus (see USSR)		
Canada	230041	3.74
Chile	14883	0.24
China	110192	1.79
Czechoslovakia	28717	0.47
Denmark	54861	0.89
Ecuador	4209	0.07
Egypt	9999	0.16
Finland	47883	0.78
France	371330	6.04
Germany	647367	10.52
Guinea		
Hungary	18387	0.30
Iraq		
Italy	291416	4.74
Lesotho		
Mexico	46452	0.75
Netherlands	212143	3.45
Norway	507875	0.83
Romania		
Spain	115896	1.88
Sweden	100433	1.63
Switzerland	109771	1.78
Syrian AR	5103	0.08
Uganda	250	,0.01
Ukraine (see USSR)		
USSR	223776	3.64
USA	857007	13.93
Yugoslavia	28165	0.46
Zambia	2220	0.04
<b>Totals</b>	<b>3773899</b>	<b>61.34</b>

Note: 1 = overall world trade total - US\$6152754 million

Source: 1989 International trade Statistics Yearbook - UN, New York

## APPENDIX D

### NEW ZEALAND EXTERNAL TRADE STATISTICS

(Year ended June 1989)

<i>Trade with:</i>	<i>Out (NZ\$m)</i>	<i>Out (%)</i>	<i>In (NZ\$m)</i>	<i>In (%)</i>	<i>In and Out (NZ\$m)</i>	<i>In and out (%)</i>
Argentina	2.3	0.02	18.3	0.15	20.6	0.08
Australia	2608.9	17.78	2672.9	21.40	5281.8	19.45
Austria	4.0	0.03	34.2	0.27	38.2	0.14
Bulgaria		0.00		0.00		0.00
Belarus (see USSR)						
Canada	261.2	1.78	254.6	2.04	515.8	1.90
Chile	11.3	0.08	11.8	0.09	23.1	0.09
China	539.5	3.68	141.1	1.13	680.6	2.51
Czechoslovakia	21.1	0.14	7.2	0.06	28.3	0.10
Denmark	30.7	0.21	60.9	0.49	91.6	0.34
Ecuador	1.0	0.01	26.1	0.21	27.1	0.10
Egypt	29.6	0.20	0.1	0.00	29.7	0.11
Finland	5.9	0.04	49.6	0.40	55.5	0.20
France	204.8	1.40	181.0	1.45	385.8	1.42
Germany	313.6	2.14	541.0	4.33	854.6	3.15
Guinea		0.00		0.00		0.00
Hungary	2.9	0.02	2.2	0.02	5.1	0.02
Iraq	1.1	0.01		0.00	1.1	0.00
Italy	316.8	2.16	216.2	1.73	533.0	1.96
Lesotho		0.00		0.00		0.00
Mexico	139.7	0.95	35.1	0.28	174.8	0.64
Netherlands	171.2	1.17	138.1	1.11	309.3	1.14
Norway	3.9	0.03	38.6	0.31	42.5	0.16
Romania		0.00	3.6	0.03	3.6	0.01
Spain	95.7	0.65	49.1	0.39	144.8	0.53
Sweden	30.8	0.21	178.9	1.43	209.7	0.77
Switzerland	44.4	0.30	112.6	0.90	157.0	0.58
Syrian AR	1.5	0.01		0.00	1.5	0.01
Uganda		0.00		0.00		0.00
Ukraine (see USSR)						
USSR	351.9	2.40	23.9	0.19	375.8	1.38
USA	2008.1	13.69	2067.3	16.55	4075.4	15.00
Yugoslavia	10.4	0.07	3.4	0.03	13.8	0.05
Zambia	0.2	0.00	0.5	0.00	0.7	0.00
All Convention States	7212.5	49.16	6868.3	54.98	14080.8	51.84
World	14671.1		12491.4		27162.5	

Source: New Zealand Official Yearbook, Department of Statistics 1990

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## APPENDIX E

### Select Bibliography

Abbreviations used in the commentary appear in bold in this appendix.

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## APPENDIX F

### INTERNATIONAL COMMERCIAL LAW REFORM AGENCIES

#### COMMONWEALTH SECRETARIAT

Established: 1965

Established by: Commonwealth Heads of Government

Functions: Collects and disseminates information, gives effect to collective decisions and generally facilitates the discussion of problems common to Commonwealth countries; joint consultation; and co-operation among member countries. The Legal Division arranges a triennial Commonwealth Law Ministers Meeting, provides legislative drafting assistance and courses for government lawyers.

Sample of work: Commonwealth Law Bulletin; Commonwealth Declarations; and Commonwealth Currents.

#### ICAO

#### INTERNATIONAL CIVIL AVIATION ORGANISATION

Established: 1947 (superseding earlier organisations)

Established by: 1944 Chicago Convention (with annexes)

Membership: 162 governments (including New Zealand and Australia)

Relationship to UN: UN specialised agency

Functions: Establishment and review of international standards relating to aircraft, personnel, telecommunications, meteorology and rules of the air; assistance of developing nations; development of conventions; resolution of disputes between members; and development of co-operation between nations.

Sample of work: Standards and recommended practices (published as annexes to the Chicago Convention); protocols to the Warsaw Convention; ICAO Bulletin; digest of statistics; manuals; and circulars.

## ICC

### INTERNATIONAL CHAMBER OF COMMERCE

Established: 1920

Established by: Decision of International Trade Conference 1919

Membership: National committees of 59 countries (including New Zealand)

Relationship to UN: Observer status with UNCITRAL and links with other UN agencies which deal with economic matters

Functions: Searches for practical solutions to obstacles that hamper the mechanism of world trade; speaks for the business community in the international arena; provides a forum at which business leaders and intergovernmental organisations can make contact; publishes/produces practical works of business relevance; supports the Court of International Commercial Arbitration.

Sample of work: Incoterms; ICC Handbook; and various other handbooks and guides.

## IMO

### INTERNATIONAL MARITIME ORGANISATION

(formerly the INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANISATION)

Established: 1958

Established by: Convention of the UN Maritime Conference 1948

Membership: 132 governments (including New Zealand and Australia)

Relationship to UN: UN specialised agency

Functions: Establishment and review of international standards relating to, among others, marine safety, carriage of dangerous goods, ship design, marine equipment, cargoes and containers and telecommunications.

Sample of work: International Regulations for Preventing Collisions at Sea 1960; Convention on Facilitation of Maritime Traffic 1965; International Convention on Load Lines 1966; Convention on Limitation for Liability for Maritime Claims 1976; International Convention on Salvage 1989; IMO News.

## UNCITRAL

### UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Established: 1966

Established by: UN General Assembly

Membership: 36 States (Commission membership is rotated - Australia is a past member)

Relationship to UN: Commission of the UN General Assembly

Functions: Endeavours to reduce obstacles to the flow of international trade through progressive harmonisation and unification of private international law; preparation, and promotion of the adoption of, new international conventions; promotion of participation in existing conventions; liaison with UNCTAD and other UN agencies; and provision of training and assistance.

Sample of work: Convention on the Limitation Period in the International Sale of Goods 1974; UN Convention on the Carriage of Goods by Sea 1978; UN Convention on Contracts for the International Sale of Goods 1980; UNCITRAL Model Law on International Commercial Arbitration; UNCITRAL Conciliation Rules.

## UNCTAD

### UN CONFERENCE ON TRADE AND DEVELOPMENT

Established: 1963

Established by: UN General Assembly

Membership: 168 countries (including New Zealand and Australia)

Relationship to UN: Permanent organ of the UN General Assembly

Functions: Promotes international trade; formulates and implements principles and policies on international trade; reviews and facilitates other UN agencies' activities in the field of international trade and related economic development; initiates action for negotiation and adoption of multilateral legal agreement in the field of trade; acts as a centre for harmonisation of trade and development policies of government.

Sample of work: Set of Multilaterally agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 1980; UN Convention on International Multimodal Transport; Commodity Yearbook; Commodity Price Bulletin; Handbook of International Trade and Development Statistics; Trade and Development Review.

## UNIDROIT

### INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW

Established: 1928

Established by: Originally, agreement between the Italian Government and the League of Nations but, since 1940, by multilateral agreement ("Statute Organique")

Membership: 53 governments (including Australia)

Relationship to UN: Agreement with UNCTAD and IMO (among others) and (observer status at annual sessions of UNCITRAL)

Functions: Study of methods for harmonisation of private law between States; prepares drafts of laws and conventions.

Sample of work: Uniform Law for International Sale of Goods 1964 (ULIS); Uniform Law on Formation of Contracts for the International Sale of Goods 1964 (ULF); Bulletin d'informations UNIDROIT; Uniform Law Review.

## THE HAGUE CONFERENCE

### THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Established: First meeting 1893 but permanently established 1955

Established by: Statute of 1951

Membership: 36 governments (including Australia)

Relationship to UN: Agreement for co-operation with UNCTAD and links with UNCITRAL

Functions: Progressive unification of rules of private international law by conclusion of treaties.

Sample of work: Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961; Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965; Convention on the Law Applicable to Trusts and their Recognition 1985; Convention on the Law Applicable to International Sale of Goods 1985; Recueil des Conventions - Collection of Conventions (1951-1988).

## WIPO

### WORLD INTELLECTUAL PROPERTY ORGANIZATION

Established: 1970

Established by: Stockholm Convention 1967

Membership: 126 governments (including New Zealand and Australia)

Relationship to UN: UN specialised agency

Functions: Promotes the protection of intellectual property worldwide; administers treaties including the Paris Convention 1883 (literary and artistic works) and the Berne Convention 1886 (copyright).

Sample of work: Treaty on the International Registration of Audiovisual Works 1989; Treaty on Intellectual Property in Respect of Integrated Circuits 1989; Copyright; Industrial Property; International Designs Bulletin.

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# APPENDIX G

## CONSULTATION AND ACKNOWLEDGEMENTS

The discussion papers and reports published by the Law Commission, the other drafts and papers it distributes and its other processes demonstrate that the Commission considers that consultation greatly helps its work. The process it has followed in this case is more limited.

The basic reason for that limit is that already briefly indicated in chapter I: the main processes of consultation and decision about the two critical questions whether a uniform international sales law should be prepared and what it should say were completed in 1980 with the adoption of the Convention following a very lengthy process which began 50 years before. A consultative process, if undertaken now within New Zealand, could add nothing at all to the discussion of and answers to those two questions. The consultation here and now had to relate to the more limited question whether New Zealand should accept and implement uniform law.

As chapter IV indicates, the answer even to that question has been very substantially given by the positive actions taken by several of New Zealand's major trading partners over the past 12 years and especially by the decisions taken in 1990 in the CER context following Australia's acceptance of the Convention.

The Commission, in agreement with the Department of Justice, has nevertheless thought it important to engage in some consultation both about the proposed government actions and to provide more extensive knowledge of the new rules, which probably already apply to much New Zealand external trade.

In October 1989 experienced commercial lawyers and academic lawyers attended a seminar on the Convention organised by the Commission. We also sought comment at that time on a very early version of this Report. In April this year, the Commission circulated a draft of this Report to a limited number of practitioners, academics and officials both within New Zealand and beyond.

We are very grateful for the comment which they have provided. Only one of the responses is negative. The remainder range from cautiously to enthusiastically supportive of the Government's proposal to accept and implement the Convention.

There have been other opportunities for these matters to be considered by New Zealand lawyers and officials, for instance at the international trade law symposium organised by Russell McVeagh McKenzie Bartleet in Auckland, Sydney and Wellington in 1991 and the annual international trade law conferences organised by the Attorney-General's Department in Canberra.



We also gratefully acknowledge the significant contributions made to this project by Jim Cameron and Jack Hodder while members of the Law Commission.

The following have also contributed to the Commission's work on this matter:

Anderson G, Victoria University

Bell Gully Buddle Weir particularly M Carruthers

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Close AL, QC, Law Reform Commission of British Columbia

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Diamond A, QC

Hoffman H, Department of Justice

Honnold J, University of Pennsylvania

Kennedy-Good J, New Zealand Dairy Board

Kensington Swan, particularly RH Cathie

McLauchlan D, Victoria University

Paterson RK, University of British Columbia

Patterson R and Fowler N, Ministry of External Relations & Trade

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Steel M, Ministry of Commerce

UNCITRAL

White DJ, QC

Wilson K, Attorney-General's Department, Canberra.

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