

THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A PRACTICAL GUIDE FOR THE STATE OF MARYLAND AND ITS TRADE COMMUNITY

INTRODUCTION

A national increase in exports and imports throughout the last decade indicates that American businesses are looking beyond the states of the union to expand their markets.¹ The increase in world trade has brought the need for the unification of private international law into the spotlight. Although this pursuit originated prior to World War II,² it was not until three decades later that a significant number of nations reached a consensus.³ The result was the United Nations

1. In 1980, the exports and imports of the United States totaled \$200.9 billion and \$240.9 billion, respectively. By 1989, these figures had risen to \$363.8 billion in exports and \$473.2 billion in imports. THE WORLD ALMANAC AND BOOK OF FACTS: 1991, 161 (Mark S. Hoffman ed. 1990).

2. In 1935, the International Institute for the Unification of Private Law ("UN-DROIT"), commissioned by the League of Nations, presented one of the first drafts of uniform law for the international sale of goods. See John O. Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223, 223 (1979) [hereinafter *Overview*].

3. In 1951, after the brief hiatus due to the Second World War, the Government of the Netherlands held a conference at the Hague; twenty-one nations attended. Thirteen years later, twenty-three members at the Hague Conference of 1964 drafted the Uniform Law on the International Sale of Goods ("ULIS"), July 1, 1964, 834 U.N.T.S. 107, reprinted in 3 I.L.M. 855 (1964), and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF"), 834 U.N.T.S. 169, reprinted in 3 I.L.M. 864 (1964). See *Overview, supra* note 2, at 223-24. The ULIS and ULF received little enthusiasm. While its terms have been labeled as "coercive," its substantive law catered disproportionately to the European community. See generally *Report of the United States Delegation to the United Nations Conference on Contracts for the International Sale of Goods* (submitted to the Secretary of State by John O. Honnold, Co-Chairman of the Delegation, 1981); Isaac I. Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L L. 521, 526 (1983) [hereinafter *Dore*]. The United States did not even participate in the drafting process of these two documents until the eleventh hour. As a result, only eight nations ratified these treaties: Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, the Netherlands, San Marino, and the United Kingdom. See *Overview, supra* note 2, at 224 n.7. The United Kingdom did so in such a way as to make their effect on English trade a nullity. This was achieved by requiring contracting parties to expressly adopt the ULIS and/or the ULF within the contract in order for their provisions to apply. See Paul Lansing, *The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL*, 18 AM. BUS. L.J. 269, 273 n.14 (1980). In its continual pursuit for unification, the United Nations created the Commission on International Trade Law ("UNCI-

1980 Convention on the Contracts for the International Sale of Goods ("CISG" or "Convention").⁴ On December 11, 1986, the United States deposited its instrument of ratification, bringing the total number of contracting states to eleven.⁵ Having met the ten country threshold, the Convention entered into force on January 1, 1988.⁶

This comment evaluates the impact of the Convention on international trade and provides a practical guide for Maryland businesses and practitioners. First, this comment discusses the history and the general scope of the CISG. Second, it reports on the Maryland business community's awareness of the Convention. Third, the comment highlights the areas of conflict between the Convention and the Uniform Commercial Code ("U.C.C."). In conclusion, this comment puts forth several recommendations for the dissemination of information concerning the Convention and the inevitable future judicial interpretations of its provisions.⁷

TRAL") in 1966. See G.A. Res. 2205 (XI), 11 U.N. GAOR Supp. (No. 6) at 99, U.N. Doc. A/6316 (1966). UNCITRAL began its work on a unified sales law in 1968 and met annually until a completed draft was approved in 1978. See *Report of the United Nations Commission on International Trade Law on the Work of its Eleventh Session*, 33 U.N. GAOR Supp. (No. 17), U.N. Doc. A/33/17 (1978). The 1980 Vienna Convention gave 62 attending countries the opportunity to review UNCITRAL's draft, make changes where necessary, and to unanimously approve of the Convention. See Convention, *infra* note 4, at 176.

4. *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, Annex I, U.N. Doc. A/Conf. 97/18 (1980), reprinted in 19 I.L.M. 668 (1980); 52 Fed. Reg. 6262 (1987) [hereinafter Convention or CISG].

5. See Convention, *supra* note 4, 52 Fed. Reg. 6262. At this time, the other contracting states included Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, Yugoslavia, and Zambia. Michael Berlin, *U.N. Trade Pact Triggered*, WASH. POST, Dec. 12, 1986, at D11; 52 Fed. Reg. 6262.

For the purpose of this comment, "contracting states" refers to those countries which have either ratified or acceded to the Convention. As of January 1, 1991, the following states have signed or ratified the Convention: Argentina (ratified), Australia (ratified), Austria, Bulgaria, Byelorussia (ratified), Chile, China (approval), Czechoslovakia, Denmark, Egypt (ratified), Finland, France (approval), Germany, Hungary, Iraq (ratified), Italy, Lesotho (ratified), Mexico (ratified), Netherlands (accepted), Norway, Spain (accession), Sweden, Switzerland (ratified), Syrian Arab Republic (ratified), Ukraine (accepted), Soviet Union (ratified), United States (ratified), Yugoslavia, Zambia (accession), Guinea (ratified), Canada (ratified), and Romania (ratified). *Multinational Treaties Depository: Addendum*, Secretary General of the United Nations.

6. See Convention, *supra* note 4, arts. 99(1) & 101(2).

7. See, e.g., *Orbisphere Corporation v. United States*, 726 F. Supp. 1344 (Ct. Int'l Trade 1989); *Interag Company Ltd. v. Stafford Phase Corporation*, No. 89 Civ. 4950 (OSH), 1990 U.S. Dist. LEXIS 6134 (S.D.N.Y. 1990); *Promaulayko v. Amtorg Trading Corporation*, 540 A.2d 893 (N.J. Super. Ct. App. Div. 1988).

I. THE HISTORY AND SCOPE OF THE CONVENTION

The Convention consists of one hundred and one articles. They are based upon general principles to which the parties and the courts are directed for the purpose of interpretation.⁸ These principles include, but are not limited to, the following: the protection of a party who has relied on the conduct of another party, the duty to communicate necessary information, the duty to mitigate damages, the international character of the Convention, good faith, and the freedom of contract.⁹ The ultimate goal is to synthesize the divergent national laws of the contracting states into a single and effective universal doctrine. The CISG strives to promote certainty among contracting parties and simplicity in judicial understanding of the contract terms and their ramifications. More specifically, the Convention strives to achieve the following: (1) reduction of forum-shopping; (2) reduction of the need to resort to rules of private international law; and, (3) establishment of a law of sales appropriate for international transactions.¹⁰

The Convention establishes default provisions.¹¹ Under Article Six,¹² it preserves the freedom of contract and insures that the intent of the parties will be determinative on questions of interpretation. When the intent of the parties is not discernable from the text or parole evidence of the contract,¹³ the "general principles" come in to fill the

8. Convention, *supra* note 4, art. 7.

9. See, e.g., Martin L. Zientz, Comment, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?*, 2 Nw. J. INT'L L. & Bus. 129, 142 (1980).

10. *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF. 97/5 [hereinafter *Commentary*], reprinted in *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF. 97/19 (1981), at 15 [hereinafter *Official Records*].

11. Maryland practitioners and corporate entities should be familiar with the Uniform Partnership Act and/or the Revised Model Business Corporation Act. Both of these doctrines are default in nature. The relevant provisions become applicable to the partnership or corporate agreement only if the parties involved fail to provide for the disputed issue in their contract. Parties may also avoid the influence of these doctrines with a blanket statement at the commencement of their contract: "The provisions of the Uniform Partnership Act will not apply." See MD CORPS. & ASS'NS CODE ANN. § 9-101 (1990).

12. Convention, *supra* note 4, art. 6. This Article provides that "[T]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." *Id.*

13. Convention, *supra* note 4, art. 8(3). The relevant subsection of Article 8 reads: 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

gaps.¹⁴ The provisions will only apply when parties have failed to indicate—through negligence, inadvertence, or intentional choice—which law governs their agreement. If the parties want to “opt out” of the Convention, they must do so expressly.¹⁵ Exclusion by implication is not sufficient.¹⁶

The Convention applies to contracts for the sale of goods between a buyer and a seller located in different contracting countries.¹⁷ It may

of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Id.

14. The Drafters provided a two-step procedure to fill gaps in the Convention: First: if explicit provisions, interpreted in light of the Convention's international character, do not resolve a question, the adjudicator should seek an answer in the Convention's general principles. Second, if no general principles apply to the case, the adjudicator should seek to fill the gap in the Convention on the basis of the law applicable by virtue of the rules of private international law.

Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1992 (1984) [hereinafter *Unification*].

15. One commentator has noted that:

[W]hen opting out it is not sufficient to simply say ‘the laws of New York apply’ because the CISG would be the law of the State of New York under certain circumstances. Rather, one would say ‘the provisions of the Uniform Commercial Code as adopted by the State of New York, and not the United Nations Convention on Contracts for the International Sale of Goods apply.’

Mark A. Goldstein, *The U.N. Sales Convention: A New Tool to Help in Drafting International Sales Contracts*, BUS. AM., Nov. 21, 1988, at 12.

16. Article 6 of the Convention does not specify whether the exclusion must be express or implied. While Article 3 of the ULIS provided in part that “such exclusion may be express or implied,” the drafters of the Convention set aside these terms in order to discourage “courts [from concluding], on insufficient grounds, that the Convention had been wholly excluded.” *Commentary, supra* note 10, at 17 para. 2 (comments on draft art. 5, current art. 6).

17. Convention, *supra* note 4, art. 1. Article 1 provides:

(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 deter-

also apply to like contracts between a contracting and a non-contracting state if the rules of private international law lead to the application of the law of a contracting state.¹⁸ The United States, however, by filing a reservation of the latter provision, has limited the Convention's scope to agreements between contracting states.¹⁹

Among the agreements excluded from the scope of the Convention are those which relate to service contracts, mixed service-goods contracts that have a predominately service nature,²⁰ goods sold for consumer use or by auction²¹ negotiable instruments, ships or aircraft, and electricity.²² In addition, the Convention will not govern issues of contract validity²³ or property title to goods sold.²⁴ As a result, a transaction between a United States seller and a foreign buyer which falls within one of these exceptions will, if the choice of law rules so direct, be governed by the U.C.C..²⁵

mining the application of this Convention.

Id.

18. Convention, *supra* note 4, art. 1(1)(b).

19. The United States (U.S.) filed a reservation under Article 95 at the time of ratification. Such a reservation reduces the uncertainty between parties when negotiating choice of law provisions. As a result, if a U.S. party contracts with a party from a noncontracting state and a dispute arises, the litigation of the suit within the U.S. will call for the application of private international law which is likely to lead to the application of U.S. law. "In view of the reservation, it is the U.C.C. that will apply." Dore, *supra* note 3, at 538. Other States which have also filed an Article 95 reservation include Czechoslovakia and the People's Republic of China. THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS, (Daniel B. Magraw and Reed R. Kathrein ed. 1990).

20. Convention, *supra* note 4, art. 3; *see, e.g.*, Bradley J. Richards, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 689 IOWA L. REV. 209, 227-34 (1983) [hereinafter Richards]. "The CISG will be excluded only if the buyer supplies a *substantial* amount of the raw materials necessary for the manufacture of the product." *Id.* at 230.

21. *See, e.g.*, Robert S. Miller, *The Sale of Horses and Horse Interests: A Transactional Approach*, 78 KY. L.J. 517, 552 n. 260 (1990) (citing Robert M. Beck, *Purchase and Sale of Equine Assets Under United Nations Convention on Contracts for the International Sale of Goods*, Univ. of Ky. Equine Law Seminar (1989)).

22. Convention, *supra* note 4, art. 2.

23. *Id.* at art. 4(a). "[T]he drafting history of [A]rticle 4 suggests that the UNCITRAL representatives considered issues of validity to include only issues such as fraud, duress, unconscionability, and incapacity." Amy H. Kastely, *The Right to Require Performance in International Sales: Towards An International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 646 (1988) [hereinafter Kastely]. These matters involve serious "issues of public policy and the protection of parties" leading the Convention to defer to domestic law. *Id.*

24. Convention, *supra* note 4, art. 4(b).

25. Some examples of sales not falling under the authority of Article 2(a) and,

Parts I and II of the Convention provide guidelines for interpreting the intent of the parties,²⁶ explain the term "place of business" in relation to the applicability of the Convention,²⁷ outline the form a valid international contract may assume and discuss the issues of offer and acceptance.

Part III, entitled "Sale of Goods", is the heart of the Convention. Its provisions address such topics as fundamental breach,²⁸ modification of contract,²⁹ obligations of the seller,³⁰ and buyer,³¹ third party claims,³² remedies,³³ passing of risk,³⁴ and damages.³⁵ It is not within

therefore, governed by the Convention include: "the purchase of a camera by a professional photographer for use in his business; the purchase of soap or other toiletries by a business for the personal use of the employees; and the purchase of a single automobile by a dealer for resale." *Commentary, supra* note 10, at 16 para. 2.

Section 1-105 of the U.C.C. governs choice of law and provides, in part: "When a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." U.C.C. § 1-105(1) (1990). And, if the parties do not opt for a specific law, the U.C.C. "applies to transaction bearing an appropriate relation to this state." *Id.*

When parties fail to agree, Section 1-201(3) of the U.C.C. directs the forum to look beyond the words of the contract and to the contacts of the transaction. U.C.C. § 1-201(3). If the preponderance of contacts is with one jurisdiction, this indicates that the parties implicitly agreed on that jurisdiction's law as the applicable law. Hence, in the absence of an agreement, the jurisdiction with the preponderance of contacts would bear the appropriate relation, and, therefore, the law of that jurisdiction would apply. Robert J. Nordstrom & Dale B. Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623, 632 (1969).

26. *See supra* notes 13-14 and accompanying text.

27. Convention, *supra* note 4, art. 10. The provision in Article 10 reads:

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 made to his habitual residence.

Id. For a detailed discussion, including hypothetical, concerning this issue, *see* Richards, *supra* note 20, at 218-21.

28. Convention, *supra* note 4, art. 25.

29. *Id.* art. 29.

30. *Id.* arts. 30-44.

31. *Id.* arts. 53-65.

32. *Id.* arts. 41-43.

33. *Id.* arts. 45-52 & 61-65.

34. *Id.* arts. 66-70.

35. *Id.* arts. 74-78.

the scope of this comment to provide a detailed analysis of every article of the Convention. Rather, this comment will address the distinctions between the CISG and the U.C.C. which are of critical importance to the American trader.³⁶

Part IV, entitled "Final Provisions", includes Articles 89 through 101. These ministerial provisions of the Convention have been annexed to several United Nations treaties.³⁷ They provide necessary information regarding ratification, reservations and the Convention's entry into force.

II. THE CONVENTION AND MARYLAND TRADE

An informal survey was conducted, for the purpose of this comment, to determine the level of awareness of the Convention among Maryland international businesses.³⁸ The companies participating in the survey ranged from the very large, House of Seagram, to the very modest, Holland Cycles.³⁹ Representatives of these companies ranged

36. See *supra* notes 52-102 and accompanying text.

37. For an analysis of the Final Provisions, see Peter Winship, *Final Provisions of UNCITRAL's International Commercial Law Conventions*, 24 INT'L L. REV. 711 (1990).

38. The sample population of Maryland businesses currently engaging in international trade was provided by the Maryland International Division ("Division"), a governmental organization whose mission is to "direct and coordinate the state's international trade and business development activities." Brochure, Maryland International Division, The World Trade Center, 7th Floor, 401 East Pratt Street, Baltimore, Maryland 21202 ((410) 333-8180) (The Division has labeled itself the "One-Stop Shop" for Maryland international traders). The original sample included 21 Maryland traders and two export-trading companies. From the 23 potential subjects, five could not be reached and, of the remaining 18, three had discontinued their international operations.

39. The following companies participated in the survey:

- Fleetwood Travel Trailors, Hancock
- Venture Plastics, Baltimore
- Ottenheimer Publishers, Baltimore
- House of Seagram, Baltimore
- Mary Sue Candies, Inc., Baltimore
- A & A Plastics, Lutherville
- Consolidated Instrument Corp., Baltimore
- Hughes Box & Container Corp., Baltimore
- Translingua Inc., Baltimore
- J A G Industries, Baltimore
- Allied Research Corp., Baltimore
- Black & Decker U.S. Inc., Easton
- Comsat Labs Corp., Clarksburg
- Hollands Cycles, Reisterstown
- A B C Rail Corp., Baltimore

from an administrative assistant to the President and Chief Executive Officer. In sum, according to these spokespersons, the Convention is unknown and, upon hearing a description, unnecessary.⁴⁰ Several of the grounds for this sentiment deserve further discussion.

A. The Irrevocable Letter of Credit

Many of the respondents viewed their companies as immune from the Convention due to their use of the irrevocable letter of credit.⁴¹ The premise upon which their arguments were based is that the irrevocable letter of credit is a sales contract governed by the U.C.C. and, therefore, exempt from the Convention.⁴²

The first error in this contention lies in the distinction between a letter of credit and a contract. The irrevocable letter of credit⁴³ is a

Amisco Inc., Cockeysville
 Danko Arlington Inc., Baltimore
 Dataflow Technologies Inc., Lutherville
 Kelly-Springfield Tire Co., Cumberland
 Mecca Enterprises, Glen Burnie
 AFT International LTD, Chevy Chase
 International Purchasers Inc., Reisterstown

40. The American Bar Association would differ from this conclusion. In a Resolution recommended by the Section of International Law (1981), the ABA discussed four specific benefits of the Convention to U.S. businesses:

- (1) avoidance of difficulties in reaching agreement with foreign buyers and sellers on choice of forum or law;
- (2) ability of parties, under the Convention, to continue to determine their rights and obligations along the same lines as under the U.C.C. without fear of foreign mandatory rules;
- (3) decrease in costs for legal research on foreign laws because they would be replaced by a single Convention available in an official English text; and
- (4) reduction of problems of proof of foreign law in domestic or foreign courts.

ABA Resolution by Section of International Law at 2-3 (text of resolution and accompanying Background Report on file at St. Louis University Law Library).

41. The representative of Mary Sue Candies, Inc. of Baltimore told this author, "Well, that [referring to the Convention] doesn't apply to us . . . we use the irrevocable letter of credit." Telephone Interview with Representative, Mary Sue Candies, Inc., in Baltimore, Md. (September 30, 1991).

42. The official position of the Maryland Industrial Development Financing Authority ("MIDFA"), is that letters of credit are governed by the U.C.C., thereby exempting such transactions from the Convention. Telephone Interview with Leslie Meek, representative of the MIDFA (Oct. 17, 1991).

43. There are three types of Letters of Credit: (1) Confirmed Irrevocable Letter of Credit, (2) Unconfirmed or Advised Irrevocable Letter of Credit, and (3) Revocable Letter of Credit. The Irrevocable Letter of Credit [hereinafter ILC] is the safest form

method of payment, not a sales contract in and of itself. Its terms and conditions must be reviewed to ensure their compliance with the sales contract.⁴⁴ Due to the nature of documentation,⁴⁵ companies are inclined to believe that these drafts represent the official and complete contract. John Siegmund, a writer for *Business America*, says it best:

The international sale of goods is now subject to considerable legal uncertainty. Often the uncertainty results because the buyer and seller have used order books, invoices and telexes to arrange a transaction. As a result, a *detailed* sales contract does not exist. If a problem arises, the parties simply may not have considered and agreed beforehand how to resolve it.⁴⁶

The second error in the initial premise, that an irrevocable letter of credit is immune from the Convention, is caused by a misunderstanding regarding the effect of the U.C.C.. It is imperative that an international company understand that coverage of a contractual agreement by the U.C.C. does not immunize such an agreement from falling under the authority of the Convention. The only method of insulating an agreement from the Convention's influence is to expressly contract out of the Convention within the written document.⁴⁷

of payment. A typical transaction occurs as follows:

After the exporter and customer agree on the terms of sale, the customer arranges for its bank to open an ILC to be confirmed by a U.S. bank. The buyer's bank then prepares the ILC and sends it to a U.S. bank requesting confirmation. This U.S. bank drafts a letter of confirmation to forward to the exporter, along with the ILC. The exporter must review all of the conditions in the ILC *to make sure that they are consistent with the terms and conditions in the sales contract*. If all is well, the exporter notifies the freight forwarder to deliver the goods to the designated port or airport. Once the goods are loaded, the exporter presents all documents indicating full compliance to the U.S. bank for payment. Once the check is issued, the documents are sent to the buyer in order that he or she may claim the goods.

The Law Firm of Frank, Bernstein, Conaway, and Goldman and the Maryland Chamber of Commerce (in cooperation with the Maryland International Division Office of International Trade), *THE MARYLAND GUIDE TO INTERNATIONAL TRADE* 65-68 (1990).

44. *See supra* note 34.

45. *See infra* notes 54-61 and accompanying text.

46. John Siegmund, *UN Convention on Contracts for International Sale of Goods Set for Senate Consideration*, *BUS. AM.*, Jan. 23, 1984, at 18.

47. *See supra* notes 15-16 and accompanying text.

B. Cash Transactions

Similar to the misconception concerning letters of credit is the belief that the Convention does not cover cash sales. Under such a transaction, a buyer pays for goods received up front, like a consumer purchase in a grocery store. Consequently, no formal contract is drafted much less contractual terms negotiated. If a conflict arises concerning the merchandise, the seller will often replace, repair, or refund the value of the goods.⁴⁸ Although this is a well established merchant practice, historical endurance does not trump the application of the Convention. Under its provisions, even a cash deal, lacking any written documentation, carries the label "contract," albeit implied, with all of its implications. In a perfect world, the option to just "reship the goods" would suffice. But this is not the case when traders are dealing with fluctuating demand, limited resources, finite access to financing and a dynamic market.

Another common response justifying immunity from the Convention concerned the minimal amount of receipts generated by international trade. One respondent regarded their small orders of \$5,000 or less as exempt,⁴⁹ while other companies have substantially different monetary thresholds.⁵⁰ This concept creates a false sense of security because, unlike the Statute of Frauds, the Convention has no minimum value requirement.⁵¹ Any and all transactions that fall within the scope of the Convention are governed by it, regardless of the value of the goods involved. In practice, it may be impractical and unnecessary to draft a tailored international contract for every nickel and dime ven-

48. A representative of A & A Plastics of Lutherville, Maryland commented: "We don't have to worry about the Convention because we take cash up front. There is no contract. [And in response to the issue of conflict, the representative stated] If there is a problem, we just reship the goods." Telephone interview with representative of A & A Plastics in Lutherville, Md. (Sept. 30, 1991).

49. Glenn Neumann, President of JAG Industries, referred to their sales process as an "open order system from catalogues" culminating in a purchase order. For this reason, and the fact that unit international sales are below \$5,000, Mr. Neumann did not feel that the Convention applied to JAG. Telephone Interview with Glenn Neumann, President, JAG Industries (Sept. 30, 1991).

50. John Hollands, owner and operator of Holland Cycles in Reisterstown, also referred to a small amount of exporting, adding that all orders are filled without difficulty. Hollands fills sporadic orders for a wide range of cycles. There is no regular exporting schedule. In addition, Hollands may, in fact, be exempt from the Convention if these are sales to consumers rather than to businesses. Telephone Interview with John Hollands, Owner, Holland Cycles in Reisterstown, Md. (Oct. 13, 1991).

51. In order for Section 2-201(1) of the U.C.C. regarding the Statute of Frauds to apply, the transaction must be valued at \$500 or more. U.C.C. § 2-201(1) (1990).

ture. However, those involved with international trading should still be aware of the Convention in the event that a conflict concerning such a transaction arises.

C. *Purchase Orders, Catalogues, and Brochures*

Purchase orders are perhaps the most widely used method of conducting merchant trade. This is most likely due to the simple and ubiquitous format assumed in most purchase orders. Their use has become so common that many businesses fail to conduct any formal negotiations because the boilerplate language of the purchase order provides the standard contractual terms required. Many Maryland companies view purchase orders as mere documentation rather than as binding contracts.⁵² Oftentimes a seller will distribute a catalogue or brochure, representing an offer, and a buyer will complete the transaction by remitting a purchase order. This order may be faxed, mailed, or verbally communicated to the seller.⁵³ The absence of a formal contract or negotiation period does not, however, exempt such commerce from the authority of the Convention. In fact, the purchase order is, in and of itself, a valid contract and, should a conflict arise, it is the provisions of the Convention rather than those of the U.C.C. that will apply.

The lack of a formally drafted sales contract does not trouble most international companies that have been conducting business with the same foreign entities for years. Such established and reliable cordial relationships may lull many companies into a false sense of security. They feel their absolute reliance on past congenial relations is justified because it fosters good will and encourages future transactions. Nonetheless, using this practice as a justification for ignorance of the Convention is unwise. A merger, takeover, or shift in upper management of

52. See *supra* note 40 and accompanying text. June Jacobs, of Baltimore Cotton Felt Corporation ("BCFC"), had never heard of the Convention but assured me that it would not apply to their company because BCFC does not deal with contracts; rather, it conducts all transactions via purchase orders, both verbal and written. Telephone Interview with June Jacobs, Baltimore Cotton Felt Corporation/Deboise Textiles, in Baltimore, Md. (Oct. 13, 1991). Mr. White, spokesperson for Danko Arlington, Inc. of Baltimore, had also never heard of the Convention and believed that it would not apply because Danko's sales were based upon "individual purchase orders" and not contracts. Telephone Interview with Mr. White, Danko Arlington, Inc., in Baltimore, Md. (Oct. 13, 1991).

53. Linda Fender, spokesperson for Dataflow Technologies, Inc. in Lutherville, thought she "may have heard of it [the Convention]" but that the company worked completely through faxed, written, or verbal purchase orders; consequently, Dataflow had given the Convention little consideration. Telephone Interview with Linda Fender, Dataflow Technologies, Inc., in Lutherville, Md. (Oct. 13, 1991).

these long-time foreign colleagues could have a significant impact upon any implied understandings and acceptable procedures which may exist. Regardless of a company's practical use of the Convention in day-to-day transactions, it is critical that an international trader and its counsel be well informed of the current status in foreign trade law in these times of economic change.

In sum, knowledge of the Convention and its provisions within the Maryland international business community is negligible. Many attribute this deficiency to a lack of the Convention's practical application. For example, many similarities exist between the Convention and the U.C.C.. However, substantial points of conflict exist. It is these areas of disagreement with which international corporations and practitioners must be familiar in order to adequately facilitate foreign trade.

III. CONFLICT BETWEEN THE CONVENTION AND THE UNIFORM COMMERCIAL CODE

The U.C.C. is now law in 49 of the 50 states.⁵⁴ Until 1988, the U.C.C. applied to both domestic and international transactions of American businesses.⁵⁵ With the entry into force of the Convention on January 1, 1988, Article 2 of the U.C.C., the sales article, was supplanted in the area of international exchanges. However, Article 2 retains its authority in domestic contracts, when the parties choose to apply the U.C.C. to their agreement and in cases in which the Convention is silent or equivocal. This section will illustrate some areas in which the U.C.C. and the Convention are in contravention. It is not the purpose of this comment to delve into the more subtle distinctions of these laws. Rather, by highlighting six areas of substantial divergence, this comment will provide a practical guide for Maryland businesses and practitioners drafting the international contract.

A. *Under the Convention, a valid contract need not be in writing*

The Statute of Frauds, as provided in Section 2-201⁵⁶ of the

54. Louisiana is the only state which has not adopted the U.C.C..

55. Although the U.C.C. does not expressly state that it applies to "international transactions," § 1-105(1) makes reference to the law of another state or nation. This indicates that the drafters intended to cover both international and domestic transactions. U.C.C. § 1-105(1) (1990). *See also* U.C.C. § 1-105 cmt. 3 (1990), which refers to the U.C.C. as "a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries." *Id.*

56. Section 2-201 of the U.C.C. provides:

U.C.C., requires that a contract for the sale of goods in excess of \$500 be in writing in order for it to be enforceable in a court of law. The policy supporting this doctrine is self-evident. Without written documentation of an agreement, a court will be at a substantial disadvantage in judging the credibility of the parties. This policy is supported by subsection (3)⁵⁷ which enumerates specific circumstances in which a writing is not required because reliable evidence of the contract is provided elsewhere.

The Convention, however, has no such writing requirement. Article 11⁵⁸ allows an agreement to take any form and to be proved by any means. As a result, Article 29⁵⁹ allows any modification or termination of an agreement to occur without written documentation. The rationale

(1) Except as otherwise provided in this section, a contract for sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable.

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (sec. 2-606).

U.C.C. § 2-201 (1990).

57. U.C.C. § 2-201(3) (1990); *see supra* note 56 (quoting this provision).

58. "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." Convention, *supra* note 4, art. 11.

59. "A contract may be modified or terminated by the mere agreement of the parties." Convention, *supra* note 4, art. 29(1).

for Article 11 is the preponderance of contracts for the international sale of goods which are arranged by means of modern technology and communication not involving written forms.⁶⁰ It is not unlikely, for example, that an overseas conference call will culminate in a sales arrangement. To invalidate such an agreement because it is not in writing would cripple the efficiency and simplicity of a large portion of international transactions.

The Convention recognizes that, notwithstanding Article 11 and its justifications, some nations insist upon strict compliance with their Statute of Frauds. In order to avoid alienating these states, the Convention incorporated Article 12⁶¹ and Article 96⁶² which effectively permit Contracting States to declare void an unwritten contract of sale. While the United States has not made this declaration, several nations, including the Soviet Union, have so reserved.⁶³ American traders need to be aware of this condition; ignorance may lead to invalidation of a contract and, as a result, significant monetary loss. In addition, verbal agreements once thought to be benign conversation may be enforceable at law if the contracting state has not filed a reservation. This situation could also lead to undesirable and unforeseen results.

60. *Commentary, supra* note 10, at 20 para. 2.

61. Article 12 provides:

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 article.

Convention, *supra* note 4, art. 12.

62. Article 96 provides:

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 or intention to be made in any form other than writing, does not apply where any party has his place of business in that State.

Convention, *supra* note 4, art. 96.

63. As of April 1990, the following Contracting States have made reservations pursuant to Articles 12 and 96: Argentina, Byelorussian Soviet Socialist Republic, Chile, and Hungary. *THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS* 65-67 (Daniel B. Magraw and Reed R. Kathrein eds., 2d ed. 1990).

B. Under the Convention, a contract is formed at the time the acceptance is received by the offeror

The Convention has adopted the "receipt theory" of civil law countries as opposed to the "dispatch theory" or "mailbox rule" of the common law and the U.C.C..⁶⁴ Article 15 of the Convention⁶⁵ provides that an offer becomes effective when it reaches the offeree and Article 18⁶⁶ provides that an acceptance becomes effective when it reaches the offeror. The performance of an act will constitute acceptance only if, by virtue of the offer or as a result of practices which the parties have established between themselves, the mode of acceptance has been agreed upon.⁶⁷ Under the receipt theory, an offer or acceptance may be withdrawn at any time prior to or in conjunction with the time that it reaches the other party.

The U.C.C. espouses the dispatch theory. Section 2-201(26) provides: "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know it." Courts of the United States have held that "it is a well established principle of contract law, often referred to as 'the mailbox rule,' that an acceptance is final and binding once it . . . 'leaves the hands of the acceptor.'"⁶⁸ In addition, Section 2-206 maintains that the performance of an act constitutes an acceptance so long as the acceptor takes reasonable steps to ensure that the other party is informed of the acceptance. The Convention's counterpart, Article 18(3), requires no such notice.⁶⁹

64. *Unification*, *supra* note 14, at 1995-96.

65. Convention, *supra* note 4, art. 15 provides:

(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.

Id.

66. Convention, *supra* note 4, art. 18 provides, in part:

(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. . .

Id.

67. *Id.* art. 18(3).

68. *Udo Madaus v. November Hill Farm, Inc.*, 630 F.Supp. 1246, 1249 (W.D.Va. 1986). *See also* *Airstream, Inc. v. CIT Financial Services, Inc.*, 768 P.2d 1302 (Idaho 1988).

69. In the case of catalogues and circulars, often present within the international transaction, the advertisements are treated "as an invitation to make offers unless the

This distinction is significant. With long distances between international contracting parties, language barriers, and dynamic markets, it is vital that the parties know exactly when an offer has been made, an acceptance returned, and a contract concluded.

C. The Convention requires that an acceptance "mirror" the terms of the offer for a contract to be formed

Under Article 19,⁷⁰ an acceptance which contains additional terms, limitations or modifications is treated as a rejection of the initial offer and a counter offer to the offeror. Although Article 19(2)⁷¹ appears to allow some leeway by transforming the acceptance only in cases of material alterations, Article 19(3) provides a broad list of terms qualifying as material, effectively limiting this leeway. For example, suppose a seller informs a potential buyer that she has 50 tractors for sale and the buyer responds with a telegram in which he attaches an additional term. In this scenario, a material alteration has occurred and the contract has not been concluded.⁷² Or, consider a seller who informs a buyer that he has twenty tons of wheat available for immediate sale and delivery. The buyer responds with an acceptance using the same exact words as the offer, only adding a clause calling for arbitration by the international wheat producers association. Again, this is a material alteration under 19(3) resulting in no agreement between the parties.⁷³ This provision is based upon the theory that "contractual ob-

'contrary is clearly indicated.'" Richard D. Kearney, *Current Development: Current Developments in Private International Law*, 81 AM. J. INT'L. L. 724, 729 (1987) [hereinafter Kearney].

70. Convention, *supra* note 4, art. 19 provides:

(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 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.

Id.

71. *See supra* note 51.

72. *Commentary, supra* note 10, at 24 para. 12.

73. *Id.*

ligations arise out of mutual agreement.”⁷⁴

The U.C.C. does not adhere to the strict views of the Convention. Section 2-207 provides:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.⁷⁵

In short, under the U.C.C., an offeree may alter almost any term of an offer unless the acceptance is conditional as stated above. Consequently, a contract will be concluded unless the offeror objects. Under the Convention, the parties could go back and forth, *ad infinitum*, and never legally conclude their transaction. This distinction is important for much of the same reasons as the prior distinction concerning the mailbox theory. If an American seller does not know when a contract has been legally completed or is mistaken as to the timing, she may over extend her resources and be liable for damages to those buyers which could not be supplied accordingly.

D. Under the Convention, a seller may disclaim all implied warranties through general language to that effect

There are several types of warranties that attach to goods upon sale. Some of these include warranties of title,⁷⁶ expressed warranties by affirmation, promise, description, or sample,⁷⁷ and implied warranties of merchantability⁷⁸ and fitness for a particular purpose.⁷⁹ The Convention does not refer to implied or express warranties but, instead speaks of conformity of goods. Regardless, the intent of the Convention and the U.C.C. is the same. Under Article 35 of the Convention, the requirements of conformity are implied in every contract “except where

74. *Id.* at 24 para 2.

75. U.C.C. § 2-207(1) (1990).

76. *Id.* § 2-312 (1990).

77. *Id.* § 2-313 (1990).

78. *Id.* § 2-314. Merchantability refers to the “ordinary use” of goods as opposed to a “particular use” of a good. “For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.” *Id.* § 2-315 cmt 2.

79. *Id.* § 2-315; see *supra* note 78.

the parties have otherwise agreed.”⁸⁰ This language imposes no requirements on the parties as to what form their disclaimer must take. As a result, the disclaimer may be achieved through general language in the contract or implicitly through the practices, trade usages and circumstances of the particular agreement.

This discretion is not found in the U.C.C. According to Section 2-316(2), in order to disclaim an implied warranty of fitness, the exclusion must be in writing and conspicuous.⁸¹ To disclaim the implied warranty of merchantability, a seller must go further—the word merchantability must be used in the disclaimer.⁸² Subsection (3) offers some examples of standard phrases, such as “with all faults” and “as is,” which will effectively disclaim all implied warranties.⁸³ In addition, course of dealing, course of performance, and usage of trade may also act to disclaim all implied warranties.

The fundamental distinction, for the majority of sales transactions, is this: the U.C.C. requires strict language to disclaim implied warranties while the Convention does not. An American trader, reading a foreign sales contract, may believe that all implied warranties have been preserved due to the lack of specific disclaimers. Notwithstanding, it is a disturbing possibility that the foreign seller’s general language has insulated that party from liability. It is, therefore, essential that the international trader be familiar with these distinctions in order to protect his interests.⁸⁴

80. Convention, *supra* note 4, art. 35(2).

81. *See infra* note 82.

82. U.C.C. § 2-316(2) provides:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

Id.

83. U.C.C. § 2-316(3)(a) (1990).

84. For an in-depth discussion on this topic, see Laura E. Longobardi, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 *FORDHAM L. REV.* 863 (1985)[hereinafter *Disclaimer*]. The author argues that the U.C.C.’s disclaimer provisions are requirements for “validity” within the meaning of the Convention. As a result, a disclaimer found invalid under the U.C.C. will be severed from the contract and the foreign seller may find himself liable for delivering nonconforming goods. For an opposing view, see Kastely, *supra* note 23. Kastely argues that the definition of validity should not be found in domestic law under private international law because this would give multiple mean-

E. The provisions of the Convention reflect a preference for specific performance

The remedial provisions of the Convention represent an "awkward compromise"⁸⁵ between civil law and common law nations. Civil law promotes specific performance as the appropriate form of contract damages based upon an innocent party's right to compel performance from the breaching party.⁸⁶ Common law follows the irreparable injury rule which states that "equity will act only if there is no adequate legal remedy."⁸⁷ Many courts in common law countries will give "adequate" a strict interpretation in order to grant specific performance and ensure that justice is done. However, in order to pay homage to the rule, the courts rarely do more than imply the true reasons supporting their decisions.⁸⁸

ings to a term within the Convention, thereby undermining the goal of uniformity. "Merely by characterizing an aspect of contract law as a rule of validity, each jurisdiction could subject contracts for the international sale of goods to numerous rules of substantive domestic commercial law." *Id.* at 645.

85. Kastely, *supra* note 23, at 610.

86. Civil law commentators offer several justifications for the universal support of specific performance: (1) it avoids under- compensation which occurs with monetary damages; (2) it preserves the contractual obligations and rights of the parties; and (3) it encourages settlements among disputing parties. *See, e.g.*, Kastely, *supra* note 23, at 626-33. *See also* George R. Delaume, *State Contracts and Transactional Arbitration*, 75 AM. J. INT'L L. 784 (1981), who argues:

Article 150 of the Libyan Civil Code provides that "[i]n bilateral contracts (contracts synallagmatiques) if one of the parties does not perform his obligation, the other party may, after serving a formal summons on the debtor, demand performance of the contract or its rescission, with damages, if due, in either case." (BP award, 53 *I.L.R.* at 331) It is therefore comparable to the law of other civil law countries, such as France or Germany.

Id. at 807.

87. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 694 (1990) [hereinafter Laycock]. Laycock argues that the irreparable injury rule—that specific performance is not appropriate where a legal remedy, i.e., money damages, is adequate—is dead in the sense that civil law jurisdictions do not follow it and common law courts have construed the rule so narrowly as to provide for specific performance in a majority of cases. This construction focuses on the word "adequate." By giving this term a very strict definition, the courts severely limited those legal remedies that may satisfy the test. Consequently, monetary damages are often declared inadequate and specific performance is awarded. *Id.*

88. For an in-depth discussion on the irreparable injury rule and its status, or lack thereof, in today's judicial arena, *see* Laycock, *supra* note 87. Some reasons given for applying the rule, and thereby rejecting specific performance, include: (1) it imposes undue hardship or interferes with countervailing rights; (2) it interferes with the authority of another tribunal; (3) specific performance bypasses a more particularized

The Convention attempts to bridge the gap by leaving the choice in the hands of the aggrieved party. Under Article 46,⁸⁹ the buyer may opt for performance of the seller's obligations or seek substitute damages.⁹⁰ Subsections (2) and (3) provide specific circumstances where the buyer may be forced to accept a reduced price, but the overall intent of this article is to encourage the seller to perform per the contract. In the same manner, Article 62 addresses the obligations of the buyer. This provisions states: "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 consistent with this requirement."⁹¹ Aware that some nations still follow the irreparable injury rule or have no judicial injunctive powers at all,⁹² the Convention tempered its remedial position in Article 28, which states:

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

remedy; (4) such a remedy is impractical to supervise; (5) the particular case is moot or not yet ripe to award specific performance; or (6) sometimes the court wants to avoid granting any relief at all. *Id.* at 692.

89. Article 46 reads:

(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 30 or within a reasonable time thereafter.

Convention, *supra* note 4, art. 46.

90. "Substitutionary remedies include compensatory damages, attorneys' fees, restitution of the money value of defendant's gain, and punitive damages. Specific remedies include injunctions, specific performance of contracts, restitution of specific property, and restitution of the very sum of money plaintiff paid." Laycock, *supra* note 87, at 696.

91. Convention, *supra* note 4, art. 62.

92. Kastely, *supra* note 23, at 625.

Convention.⁹³

The United States and the United Kingdom lobbied for the term "would" over "could," the original term in the ULIDS, thereby successfully exempting their judicial systems from the specific performance provision of the Conventions.⁹⁴ This move was justified on the grounds that specific performance was exceptional in their domestic law and economically inefficient.⁹⁵

The U.C.C. supports the opinions of the United States and the United Kingdom. Under Section 2-716, specific performance is encouraged only where the goods are unique or "in other proper circumstances."⁹⁶ Although this last phrase is sometimes construed as evidence of the U.C.C.'s liberal attitude toward equitable relief,⁹⁷ its terms are far more strict than those of the Convention.

In light of the divergent attitudes toward specific performance and the uncertainty created by the discretionary nature of the U.C.C., commentators have suggested that parties expressly opt for one method or the other within their agreement. One commentator remarked:

Contracting parties may avoid the post-breach uncertainty created by [A]rticle 28 by specifying in the contract that specific performance will or will not be available in the event of a breach. Although such terms have been relatively rare in the past, still under the Convention such a term may be advisable. The difficult question is whether such a term will be effective to assure or preclude an order of specific performance in the event of a breach.⁹⁸

The author answered this "difficult question" in the affirmative: "[A]rticle 6 should be interpreted to permit waiver of Article 28."⁹⁹

93. Convention, *supra* note 4, art. 28 (emphasis added).

94. *Id.* at 626.

95. *Id.* at 627.

96. U.C.C. § 2-716(1) (1990).

97. Kastely, *supra* note 23, at 611 n.24; *see also* U.C.C. § 2-716 cmt. 1 (1978): "without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale." *Id.* For a liberal interpretation of "other proper circumstances" *see* *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975). *But see* *Duval Co. v. Malcolm*, 214 S.E.2d 356 (Ga. 1975).

98. Kastely, *supra* note 23, at 641.

99. *Id.* at 643.

Therefore, even if a contracting state adheres to Article 28 and denies specific performance within its courts, parties to a contract should be able to agree on specific performance and have their will enforced at the time of dispute. The author concluded that "[a]n express contract term concerning specific performance should be enforceable, then, under the provisions of [A]rticles 30 and 53."¹⁰⁰

An international trader should be aware of a particular court's inclinations on the matters of remedy. Although under the Convention the parties have the right to choose, Article 28 injects a large measure of uncertainty into the situation: What will *this* court decide?¹⁰¹ The international trader should expressly provide for specific performance within the contract. This remedy is more tailored to international transactions than monetary damages for several reasons. First, international transactions require a large amount of good faith, reliability, and trust between the parties. Knowing that performance will ultimately occur reduces the risk and uncertainty involved and facilitates trade. Second, foreign buyers may have limited alternative suppliers for the distinctive goods and quantities required. Finally, there is a valuation problem as to the extent of damages incurred. Often, litigation is necessary to determine the extent of liability on the breaching party. This process results in higher costs and delay.¹⁰²

F. The Convention requires the buyer to make notice of claims only when the seller has no knowledge or is reasonably unaware of a lack of conformity

This distinction on the matter of "notice of claims" may be a minor one in light of the above discussion on remedial provisions. Nonetheless, it is important should an issue of lack of conformity of goods arise. Under the Convention, a buyer must seasonably inspect the

100. *Id.* at 647; Article 30 of the Convention provides: "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." Convention, *supra* note 4, art. 30. Article 53 states that: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." *Id.* art. 53.

101. Within the international arena, specific performance appears to be gaining a very substantial lead over other possible damages. See *TOPCO/CALASIATIC v. Libya*, reprinted in 53 ILR 389 (1973). Specific performance (in the form of restitution in integrum) is the "normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible." *Id.*

102. Kastely, *supra* note 23, at 614-15.

goods¹⁰³ and notify the seller within a reasonable time if a problem arises.¹⁰⁴ However, Article 40 provides: "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." Under these circumstances, the buyer need not give any notice to the seller in order to rely on lack of conformity.

The U.C.C. has a more strict notice of claims rule. Section 2-607(3)(a) provides: "[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Courts are split on their interpretation of this rule. The courts adhering to a strict interpretation clearly require something more than the seller's knowledge of the basis for the buyer's complaint. The more lenient jurisdictions require at least some expression of discontent but are more flexible in the form it may assume.¹⁰⁵

No courts under the U.C.C. would allow a buyer to rely on lack of conformity without expressing the slightest hint of displeasure. Consequently, if an international trader ignores this point of conflict between the U.C.C. and the Convention, she risks unfavorable judgments should a conflict arise, including complete dismissal of a complaint.

For the practitioner and the international businessperson, the aforementioned distinctions between the U.C.C. and the Convention are critical to the drafting of an international contract. Being aware of these points of conflict allows the drafters to practice prevention rather than to perform a complete overhaul once a problem arises. However, without thorough dissemination of information concerning the Convention, the ability to acquire a working knowledge is limited at best.

IV. RECOMMENDATIONS

The Maryland International Division was established "to direct and coordinate the state's international trade and business development activities."¹⁰⁶ Its function is to assist Maryland firms in the areas of international sales and investments. The Division maintains that it "wields a formidable international network to generate both commerce

103. Convention, *supra* note 4, art. 38.

104. *Id.* art. 39.

105. For an in-depth discussion on this issue, see John C. Reitz, *Against Notice: A proposal to restrict the Notice of Claims rule in U.C.C. § 2-607(3)(a)*, 73 CORNELL L. REV. 534 (1988).

106. See *supra* note 38.

and understanding for Maryland and the United States."¹⁰⁷ In spite of these claims, the survey indicates that Maryland businesses are not receiving vital information, such as notification that the United States ratified the Convention. Current methods of dissemination concerning the Convention are nearly nonexistent. The State of Maryland created the Division, established its purpose, and allocated \$4.5 million of state revenue in pursuit of this goal.¹⁰⁸ It is the duty of the state and its agencies to live up to this purpose and to keep Maryland businesses informed of the continual growth within the international arena. This section provides a starting point.

The original text of the Convention was printed in six languages: Arabic, Chinese, English, French, Russian, and Spanish.¹⁰⁹ The United Nations provided a copy of the treaty to all of the member states to deliver to their governments for further consideration. In the United States, the Office of Treaty Affairs, Department of State, maintains and updates files concerning any multilateral treaties.¹¹⁰ If the United States ratifies a particular treaty, the treaties and related documents will be published in the State Department's *Monthly Bulletin*. In addition, the Department of State publishes *Treaties in Force* annually, listing all parties to treaties and conventions to which the United States is a party. Finally, the text of the Convention is reproduced in the Department of State Public Notice #1004, 52 Fed. Reg. 6262 (1987).¹¹¹ This is the extent of the federal role in dissemination of vital information affecting international trade.¹¹²

In the realm of unofficial legal publications, John O. Honnold, a leading scholar on the Convention, has speculated as early as 1987¹¹³ that the Convention would be included in such publications as the United States Code Annotated, 1987 pocket part to 15 U.S.C.A. Appendix, Uniform Laws Annotated, Appendix to Uniform Commercial Code, United States Code Service in an appendix at the end of Title

107. *Id.*

108. "Lawmakers Critical of Md. Foreign Trade Office," *THE DAILY RECORD*, Aug. 29, 1991, at 1.

109. Convention, *supra* note 4.

110. See U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 52 Fed. Reg. 6262 (1987).

111. *Id.*

112. John O. Honnold, an expert on the Convention, has called for a re-examination of the 1950 legislation that excluded treaty law from the Statutes at Large and the United States Code. John O. Honnold, Book Review, 81 *AM. J. INT'L L.* 540, 543 (1987) (reviewing *International Sale of Goods: Dubrovnik Lectures* (Paul Volken and Petar Sarcevic eds., 1986)).

113. *Id.*

15, and Martindale-Hubbell Law Directory.¹¹⁴

The United Nations Commission on International Trade Law has been encouraged to collect and distribute reports of judicial and arbitral decisions in an orderly fashion to all the members of the United Nations. In addition, periodic interpretative recommendations have been requested.¹¹⁵ One commentator suggested that a universal judicial body be established to advise forums on questions of interpretation, to establish precedents and to disseminate information to those engaged in international trade.¹¹⁶ Others are seeking ways to educate from within the academic community.¹¹⁷

It is too early to determine whether these dissemination attempts have been successful; the treaty came into force only three years ago. It is clear, however, that the efforts of the federal government and unofficial publications will not be sufficient to establish a working knowledge among the Maryland business community. This must be accomplished through state educational programs and the efforts of practitioners.

The Division was contacted concerning their role in disseminating the Convention and other internationally relevant documents. A representative from the Maryland Industrial Development Financing Authority ("MIDFA"),¹¹⁸ one of the programs sponsored by the Division, provided the information. Apparently, the Division is unaware of the Convention. At least MIDFA's spokesperson had not been informed about any such treaty but confirmed that it was MIDFA's role to educate, advise and assist Maryland international businesses on such matters. As an alternative source of education for Maryland businesses, MIDFA suggested "the international law firm."¹¹⁹ This appears to be the extent of the state's role in educating its merchants on the Conven-

114. See *supra* note 4, 52 Fed. Reg. 6262 (1987).

115. See *Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by the Secretariat*, U.N. Doc. A/CN.9/267 (1985).

116. See V. Susanne Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 223-26 (1988) (comparing this proposed body to that of the European Economic Community's Court of Justice).

117. See John O. Honnold, *Methodology to Achieve Uniformity in Applying Internal Agreements, Examined in the Setting of the Uniform Law for International Sales Under the 1980 U.N. Convention* (Report to the Twelfth Congress of the International Academy of Comparative Law, 1986) (summarizing and presenting reports of scholars and government officials throughout the world).

118. See MD. FIN. INST. CODE ANN. § 13-107 (1990).

119. Telephone Interview with Leslie Meek, representative of MIDFA, (October 17, 1991).

tion. Such dereliction is startling in light of one writer's comment that "[t]he Vienna Convention [CISG] stands as the most important event of the 1980s in this field."¹²⁰

Thus, the burden of educating Maryland's international traders falls to the legal profession. But without a current judicial history or an interest of the state governmental agencies, how will the practitioners assimilate the necessary information? Although law review articles have been written and books have been published,¹²¹ based upon the results of the survey, the news does not seem to be traveling within Maryland. Where then should the blame lie? It is the opinion of this author that Maryland, as a state and as an advocate of international development, should bear the burden. In addition to providing a practical guide for Maryland practitioners and drafters of international contracts, it is the aim of this comment to impress upon the Maryland International Division, and its subsidiaries, the importance of this issue. Without proper guidance, Maryland businesses could be heading for trouble in the international arena.

The Division must establish and promote a continuing legal education program that informs the legal profession of developments occurring beyond our boundaries. Within its ranks, the Division should create a permanent working group whose role is to keep abreast of international developments relevant to Maryland businesses. This group would also be responsible for accumulating, synthesizing, and disseminating information to those businesses seeking the Division's counsel. Finally, the State of Maryland should publish an annual guide to international trade. With so much revenue¹²² going towards promoting Maryland's international development, it is important that some be dedicated to sustaining it.

United States traders and legal practitioners should find the provisions of the Convention useful in drafting their international sales contracts and helpful in providing solutions to traditional conflicts and uncertainties inherent in the workings of international sales.¹²³ However,

120. Allan E. Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 230 (1990).

121. See, e.g., *The Convention for the International Sale of Goods: A Handbook of Basic Materials*, (Daniel B. Magraw & Reed R. Kathrein eds., 2d ed. 1990); *Survey of International Sale of Goods*, (Louis Lafili, Franklin Gevurtz, & Dennis Campbell ed. 1986); *International Sale of Goods: Dubrovnik Lectures*, (Petar Sarcevic & Paul Volken ed. 1986), and John O. Honnold, *Documentary History of the Uniform Law for International Sales* (1989).

122. The Maryland International Division had a budget of \$4.5 million in 1991. See *supra* note 105.

123. John Siegmund, *UN Convention on Contracts for the International Sale of*

in order for this prediction to become reality, the states must actively promote a working knowledge of the Convention amongst their international businesses and legal professionals. The State of Maryland must heed this advice. To sit idle will not only impair the growth of international trade, but will create an obstacle that many Maryland businesses may not be able to overcome.

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