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Sale of Goods Between French and U.S. Merchants: Choice of Law Considerations Under the U.N. Convention on Contracts for the International Sale of Goods**

France and the United States of America both have ratified the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna on April 10, 1980.[1] As a result, most sales of merchandise

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1. U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/Conf. 97/18, 19 I.L.M. 668, 671 (1980) *reprinted in* Public Notice, 52 Fed. Reg. 662–80 (1987) [hereinafter Convention].

Comments on the Convention are too abundant to be listed here, but for two major works: J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982); C. M. BIANCA & M. J. BONNEL, COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION. An exhaustive bibliography has been published by Professor Peter Winship. Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987).

More specifically, as to the Convention's application to sales between the United States and France, see:

—***in English:*** Lansing & Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6, N.C.J. INT'L & COM. REG. 63 (1980); Dore & Defranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49 (1982); Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. INT'L LAW 521 (1983).

—***in French:*** J. THIEFFREY & C. GRANIER, LA VENTE INTERNATIONALE (1985); *Le Nouveau Droit de la Vente Internationale: La Convention de Vienne du 11 Avril 1980*, 5 CAHIERS JURIDIQUES ET FISCAUX DE L'EXPORTATION [C.J.F.E.] 1987 (collection of papers given at a symposium on the Convention in October 1987 in Paris); *Cahiers de Droit de l'Entreprise*,

between parties whose businesses are in these two countries are governed by the Convention as of January 1, 1988, the date of its coming into force.[2] According to its terms: "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; . . ."[3]

Situations may arise, however, in which the application of the new treaty law will not be automatic. For example, negotiation or conclusion of contracts through subsidiaries or branches, or even with the assistance of intermediaries or temporary offices,[4] may mask the localization in different Contracting States of the parties' participating "places of business,"[5] which would have the effect of excluding the application of the Convention.[6]

The choice of the court that will have jurisdiction in case of a dispute is also pertinent to the applicability of the Convention, at least if that

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LA SEMAINE JURIDIQUE (special issue devoted to discussions on the Convention, to be published first quarter 1988); Thieffry, *Le droit américain des contrats et le nouveau droit de la vente internationale*, REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES (Jan. 1988). For a brief comparison of American and French contract laws, see C. LECUYER-THIEFFRY & P. THIEFFRY, LE RÈGLEMENT DES LITIGES CIVILS ET COMMERCIAUX AVEC LES ÉTATS UNIS (1986).

2. As contemplated in article 99, the Convention enters into force "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession. . . ." Convention, *supra* note 1, art. 99. It has been ratified, as of Dec. 31, 1986, by Argentina, Egypt, France, Hungary, Italy, Lesotho, the People's Republic of China, Syria, the United States, Yugoslavia and Zambia, and thus comes into force on January 1, 1988 in these countries.

In addition, Austria, Mexico, Finland and Sweden ratified the Convention as of December 1987 and it comes into force in these countries as of Jan. 1, 1989.

3. Convention, *supra*, note 1, art. 2, para. 1. The United States has made the declaration of article 95 according to which "it will not be bound by subparagraph (1) (b) of Article 1 of this Convention." Convention, *supra* note 1, art. 95. Therefore, courts in the United States will not apply the Convention to sales between parties whose concerned places of business are not both in Contracting States. This would be true even in instances where their rules of conflict of law lead to the application of the law of a Contracting State. France, on the other hand, has not made the declaration of article 95, and French courts would apply the Convention in similar circumstances. For sales between the United States and France, however, this has no particular bearing: the Convention will be applied by both American and French courts on the basis of subparagraph (1) (a) of article 1 because the two countries are both parties to the Convention.

4. J. HONNOLD, *supra* note 1, No. 43.

5. In the Convention's language, a party's "place of business," if it has more than one, 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," Convention, *supra* note 1, art. 10(a).

6. This results from article 1(2) of the Convention:

> 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.

This provision must be read together with article 10 (a) of the Convention, *supra* note 1.

court is neither American nor French.[7] In particular, if a third state's court has jurisdiction by virtue of a contractual provision, or if a creditor sues its debtor in a non-Contracting State where the debtor has assets, the court will apply the municipal law indicated by its rules of conflict of laws, which will not necessarily be that of a Contracting State.[8]

Finally, in cases in which the parties have chosen arbitration to settle their disputes, it is likely that the arbitrators, who generally search the most neutral solution possible, will apply the new rules whenever they can.[9] Yet, it should be remembered that the arbitrators have some discretion to determine the rules of law they will use. The mere fact that a sale of goods occurred between two entities situated in France and in the United States, therefore, will not automatically lead the arbitrators, unlike Contracting States' courts, to apply the Convention.

However remote these hypotheses are, they suffice to demonstrate that the application of the Convention does not render choice of law clauses useless. It must be stressed that such clauses do not necessarily result in the exclusion of the Convention's provisions. Choice of law clauses are expressly allowed by article 6. Differences in interpretation, however, might arise in this respect.[10] On the one hand, it could be argued that such clauses provide for the application of a "municipal" law, that of one country or state. On the other hand, such a Convention is generally regarded as integrated within municipal law.[11] The parties to sales in the scope of the Convention should thus be very specific as to their common intent regarding the exclusion of the treaty law.

The imperfections of the treaty law could even result in parties to sales contracts using choice of law clauses in any event, for two reasons. First, not only does the Convention not govern certain matters, it provides for subsidiary application of the pertinent municipal law, which the wisdom of courts alone will maintain within reasonable limits. Second, the harmonization attempted by the Convention will necessarily suffer from the use in litigation of arguments based on the supposed affiliation of its provisions with domestic law.

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7. In fact, courts from all other Contracting States, as well as those from France and the United States, will apply the Convention to sales between the United States and France on the basis of article 1(1)(a). In such a situation, however, a third country's law could be used to interpret the contract or fill the gaps.

8. The rules of conflict of laws of some countries could, for example, result in the application of the law of the place where the contract has been entered into or where the goods are to be delivered and the payment made, which might very well be neither the United States nor France.

9. *See* Thieffry, *L'application de la Convention par les arbitres*, 5 C.J.F.E. 1311 (1987).

10. *See Id.*

11. *See, e.g.*, 74 AM. JUR. 2D TREATIES para. 5.

In addition to not applying to certain kinds of sales,[12] the Convention does not govern issues other than "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."[13] In particular, the Convention is not concerned with the validity of the contract itself, or of its individual provisions, or the effect the contract may have on title in the goods.[14] In civil law countries, experience shows that the validity of either the contract as a whole or of one or more of its provisions is frequently challenged whenever a dispute arises between the parties. The challenge of the validity of the contract is a consequence of the growth of public policy in the last decades.

As a practical matter, cases in which absolutely no provisions of domestic law are invoked will not be common even in matters governed by the Convention because parties will often assert that the particular issue submitted to the court is not addressed by the Convention. Of limited effect will be the objection that "questions concerning matters governed by [the Convention] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based."[15] This is because the basis for the intrusion of domestic law lies in the treaty itself, which provides that: "[I]n the absence of such principles" such questions must be settled "in conformity with the law applicable by virtue of the rules of private international law."[16]

The American experience may be analogous here, since article 2 of the Uniform Commercial Code[17] contains somewhat similar provisions.[18] One

12. By virtue of article 2, sales to consumers, by auction, on execution or otherwise by authority of law, of commercial paper, money, ships, vessels, hovercrafts or aircrafts, and electricity are excluded from the scope of the Convention. Article 3 will probably be the subject matter of bitter disputes, as it excludes from the scope of the Convention the supply of goods to be manufactured or produced ordered by the party who undertakes to supply a substantial part of the materials necessary for such manufacture or production and those "in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labor or other services." Convention, *supra* note 1, art. 3.

13. *Id.* art. 4.

14. *Id.* art. 4(a), (b).

15. *Id.* art. 72.

16. *Id.*

17. It is interesting to note in this respect that, although Louisiana has not adopted article 2 of the Uniform Commercial Code because it remains faithful to the French Code Napoléon, the United States has ratified the Convention. France has done so too although at least from the French viewpoint, the Convention's provisions are closer to those of the Uniform Commercial Code than those of the Civil Code. The most striking evidence of this is the absence in the Convention of any mandatory rule, probably because, not unlike in the common law, achievement of the contract's purpose as intended by the parties is the most important goal, and, therefore, the civil law distinction between mandatory and auxiliary rules does not exist.

18. U.C.C. § 1–103.

of the most renowned advocates of the Convention, Professor Honnold, recognized that the "recourse to common law principles has played a vital role in the development of the UCC."[19] According to Honnold, this is of even greater concern in the case of the Convention because, due to its international character, the municipal law referred to belongs to different systems of law. Moreover, "international unifying conventions, unlike true [civil law] codes, lack a general framework from which general principles can be derived."[20] Thus, the first guide given by the treaty law in cases where it is silent on a specific issue, that is, to look for an autonomous "gap-filling" system, might too often be inadequate. It is thus also too often that the applicable municipal law will have to be applied.

The second problem, that of the interpretation of the treaty law, is technically different from the first, although its practical consequences are likely to be similar. Courts and arbitral tribunals will find it difficult to restrain parties of different legal systems from submitting interpretations of the Convention's provisions highly influenced by those systems. It can further be questioned whether courts that belong to those different legal systems, are not in any event predisposed to adopt such substantially diverse interpretations. Here again, the Convention addresses the issue in a way very similar to the Uniform Commercial Code.[21] According to article 7, paragraph 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 observances of good faith in international trade." Even the imperfect uniformity of interpretation of the Uniform Commercial Code is out of reach of the Convention, an international compromise negotiated by countries with dissimilar legal, economic, and political systems. A well-known phenomenon in countries that have been involved in the implementation of harmonization treaties longer than has the United States is that "diversity of interpretations can create new conflicts on the very points that the Convention itself sought to solve. It is thus that the French *Cour de Cassation* has ruled that in case of divergent interpretations of a uniform international law, the rules of conflict of laws may be called upon."[22]

19. Address to UNIDROIT's International Congress in Rome by J. Honnold, The United States Commercial Code: Interpretation by the Courts of the States of the Union (Sept. 7–10, 1987) [hereinafter Honnold Address].

20. *Id.*

21. U.C.C. § 1–102.

22. Y. LOUSSOUARN & J. D. BREDIN, DROIT DU COMMERCE INTERNATIONAL No. 445 (citing Judgment of Mar. 4, 1963, Cass. civ. com., J.C.P. II No. 13376); Case note, Lescot, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 264 (1964).

For all these reasons the express choice of applicable law by the parties remains necessary, perhaps even more so now than prior to the coming into force of the Convention. Assuming that a third country's law will not be contemplated, the choice is now between four sets of rules, instead of two, since the new treaty law may be excluded by the parties.[23] The question is whether it is most desirable to have a contract for sale of goods between the United States and France governed, as it was before, by domestic French law or domestic American law, or to benefit from the new uniform rules by providing expressly for the "subsidiary" application of the law of an American state or French law to matters and issues not governed by the treaty law, as contemplated by article 7, paragraph 2, choosing, in other words "French treaty law," or "American treaty law."

The first two possibilities have the advantage of being consistent, of avoiding the introduction of new or foreign legal concepts or mechanisms into legal systems where they are unknown. The last two allow parties to benefit from the Convention's harmonizing effort. A choice must be made in two steps: first, rejection of French law; second, preference for the new American treaty law.

I. Rejection of French Law

A primary consideration favoring the renunciation by French businesses of any attempt to negotiate the submission of their sales to the United States or purchases from that country to French law is classic, independent of the existence of the Convention, and perhaps somewhat simplistic. This consideration is, quite simply, the notorious wariness of Americans concerning all that is foreign, particularly where legal matters are concerned. Thus, strictly from the point of view of negotiation, it would no doubt be easier to agree that the contract be governed by American law, whether it be treaty law, supplemented as described above, or domestic federal and state law.

At least for the French exporter, however, more rational reasons exist for adopting this position. These reasons arise from the comparison below between the domestic French law of sales and the new treaty provisions, which appear clearly more favorable to the seller. For this reason, there should be no question of excluding the application of the Convention in favor of domestic French law[24] except perhaps for French purchasers enjoying unusually favorable bargaining leverage or for American purchasers familiar with the specificities of French law. Nevertheless, the new uniform law borrows too systematically from American concepts and

23. Convention, *supra* note 1, art. 6.
24. *Id.* As is permitted by article 6 of the Convention.

mechanisms to permit its integration into the French legal system without important practical problems. This article, therefore, discusses the wisdom of choosing French law, as much from the point of view of the importer as from that of the exporter, even where its role could be described as subsidiary and limited to "gap-filling" because the Convention's provisions are not exclusive.

A. Domestic French Law Is Too Unfavorable to the Seller

It has been demonstrated by convincing examples,[25] that French sales law is particularly unfavorable to the seller and unadaptable to modern international business. Compared to the corresponding treaty provisions, certain of its particularities are very significant.

1. *Interpretation in Favor of the Purchaser*

Article 1602 of the French Civil Code provides that "any obscure or ambiguous agreement will be interpreted against the seller."[26] Numerous national laws have adopted more equitable, or at least more neutral solutions in this respect,[27] as has the Convention, which prescribes interpretation of a party's statements and conduct "according to his intent where the other party knew or could not have been unaware what that intent was."[28]

2. *Unenforceability of Warranty Disclaimers Against Nonprofessional Purchasers of the Same Specialty*

The Convention makes no allusion to clauses limiting or excluding warranties. This is in keeping with the auxiliary nature of the Convention, since article 6 permits the parties to exclude the application of one or more of its provisions. Under French law, however, few of such disclaimer clauses have been given effect by the courts in the last few years, unless they were applicable to, in the words of the *Cour de Cassation*, "professional purchasers of the same specialty as the seller."[29] Nothing indicates that a different rule would be applied in international cases.

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25. J. Thieffry & C. Granier, *supra* note 1.

26. C. civ. art. 1602-2: "Le vendeur est tenu d'expliquer clairement ce à quoi il s'oblige. Tout pacte obscur ou ambigu s'interprête contre le vendeur."

27. J. Thieffry & C. Granier, *supra* note 1, at 24–27; J. Honnold, *supra* note 1, No. 106.

28. Convention, *supra* note 1, art. 8, para. 1.

29. The case law imposes on "professional sellers" a presumption of knowledge of the defects of goods sold by them: Judgment of Apr. 27, 1971, Cass. civ. com., J.C.P. II No. 17280; Judgment of Jan. 29, 1974, Cass. civ. com., D. Jur. 268, which, according to C. Civ. art. 1643, disqualifies them from enforcing any agreed limitation of the statutory "warranty

3. *Foreclosure of the Plaintiff in Warranty Actions Involving Latent Defects*

A warranty action involving a latent defect can, under French law, be commenced as long as it is "within a brief time from the discovery of the defect."[30]

The Convention has adopted a compromise between the particularly short statutes of limitation found in certain Germanic legal systems,[31] longer statutes of limitation such as the four-year period of the Uniform Commercial Code,[32] and the French position, which is extremely favorable to the purchaser,[33] by adopting a limitations period of two years from effective receipt of the merchandise.[34]

4. *The Shifting of Risks Related to Transfer of Title*

Even when laws are not so systematically unfavorable to the seller, some other provisions of French law remain poorly adapted to the needs of modern international commerce. For example, in the area of transfer of risk, the adage *res perit domino*[35] can have unexpected consequences: the owner of the goods bears the risk of loss, irrespective of whether or not it has control of them.[36] Clearly preferable is the rule set forth in chapter 4 of the Vienna Convention[37] and borrowed from the Uniform

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against hidden defects" except against those purchasers which, being in the same technical field, are deemed just as competent. Judgment of Jan. 18, 1972, Cass. civ. com., J.C.P. II. No. 17022; Judgment of Oct. 8, 1972, Cass. civ. com., D. Jur. Somm. 72. *See* 111–12 H.L. & J. MAZEAUD, LEÇONS DE DROIT CIVIL, No. 992 (6th ed. 1984).

30. C. CIV. art. 1648: "L'action résultant des vices rédhibitoires doit être intentée par l'acquéreur dans un bref délai, suivant la nature des vices rédhibitoires, et l'usage du lieu où la vente a été faite."

31. *E.g.*, six months in the Federal Republic of Germany (article 477 Buergerliches Oesetzbuch), one year in Switzerland (Swiss Code of Obligations, article 210) and in Algeria (Algerian Civil Code art. 383).

32. U.C.C. § 2–725.

33. Article 1641 of the French Civil Code defines hidden defects the object of the legal warranty as "défauts cachés de la chose qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage, que l'acheteur n'en aurait donné qu'un moindre prix, s'il les avait connus." C. CIV. art. 1641 ("defects that render the thing improper for its intended use or which diminish said use so much that the purchaser would not have bought it, or would have paid a lower price, if he had know of them"). It flows from such a wide definition that potentially any defect impairing the goods' use before the expiration of their normal life falls within this warranty's scope.

34. Convention, *supra* note 1, art. 39 (2).

35. C. CIV. art. 1138–2: "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite . . ."

36. The only exceptions are in the cases of goods not yet produced or individualized, or, of course, if the parties have agreed otherwise. III–2 J. MAZEAUD, *supra* note 29, No. 903–1001.

37. Convention, *supra* note 1, art. 67.

Commercial Code[38] whereby the risk of loss shifts upon delivery of the merchandise to the first carrier.

Thus, domestic French law should be rejected by the seller, either in favor of the Convention or domestic American law. Foreign purchasers would do well to "concede" to their French sellers the application of French domestic law. On the other hand, only particularly strong French importers may think of excluding the application of the Convention in favor of French domestic law, which most American suppliers have long been rejecting.

B. The New Treaty Rules Are Too Different from French Law

The alacrity with which France ratified the Convention may have seemed at first glance more natural than its ratification by the United States, whose involvement in the harmonization of domestic laws is recent. Nevertheless, it was perhaps a greater step for France than for the United States, in that the concepts and reasonings borrowed from the Uniform Commercial Code and indeed, the common law, are numerous, at least in comparison to those derived from the civil law systems. The precise extent to which the Convention has borrowed from one or another system is not at issue, however, nor is the soundness of the resulting relationship. The greater modernism of American law in these matters is in itself a justification for borrowing from it. The issue is rather that French lawyers, to a larger extent than American lawyers, are definitely under the impression that the Convention brings foreign rules into their system. Practitioners will thus have to be pragmatic and prudent, since the integration of such rules into a legal system to which they are totally foreign could lead to long and difficult disputes. This will be the case particularly when it is perceived that room for interpretation of the Convention's provisions exists, or, worse, when it seems possible to call on domestic law to complete them.

1. *The Application of Concepts and Mechanisms Out of Context*

Ten examples drawn from a comparison of Convention provisions with those of French law demonstrate their difference.

a. The Offer

The idea of an offer is not the same in the Convention and French domestic law. In the latter, any catalog, price-list, or advertisement con-

38. U.C.C. § 2–509.

stitutes an offer if it is sufficiently precise.[39] Moreover, merchants are deemed to offer the goods they sell without any need for a specific intent; they are said to be in a state of "permanent offer."[40] Retaining a solution identical to that of the common law, the Convention provides that an offer not addressed to specific persons "is to be considered merely as an invitation to make offers."[41]

b. The Counter-Offer

In case of contradictions between stipulations emanating from parties to a contract, French law directs the court to inquire whether there was a "consensus."[42] If one of the parties has issued a statement containing a would-be contractual provision that has been neither expressly accepted nor rejected by the other, it is deemed a part of the contract. Where a conflict exists between the terms presented, the court disregards them and applies auxiliary rules of law. The Convention adopts neither the theory of consensus nor the famous "Battle of the Forms" of the Uniform Commercial Code[43] (which both have the advantage of leading to the recognition of the existence of a contract despite the contradiction) and instead incorporates the outmoded system of the counter-offer.[44] Only additional or different terms that "do not materially alter the terms of the offer" will not obstruct the formation of a contract.[45]

c. Revocability of the Offer: Detrimental Reliance

The Convention also borrows from equity when it provides that an offer cannot be revoked if it has induced reasonable and detrimental reliance from the offeree.[46] The functional equivalent in French law is an application of the general principle that one cannot abuse one's own rights. This, however, is a very narrow concept, an abuse of right being committed only when an act is performed with the sole purpose of injuring the plaintiff.[47]

39. P. MALAURIE, II DROIT CIVIL, THÉORIE DES OBLIGATIONS (CONTRATS) 298 (1983); J. GHESTIN, TRAITE DE DROIT CIVIL, LE CONTRAT No. 200, 154 (1980); J. CARBONNIER, DROIT CIVIL, LES OBLIGATIONS No. 15 (1979).

40. *See* sources cited *supra* note 39.

41. Convention, *supra* note 1, art. 14.

42. III P. MALAURIE, *supra* note 39, at 496 (CONTRATS ET QUASI CONTRATS).

43. U.C.C. § 2-207.

44. "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." Convention, *supra* note 1, art. 19, para. 1.

45. *Id.* art. 19, para. 2.

46. ". . . an offer cannot be revoked: . . . (b) if it was reasonable for the offeree to reply on an offer as being irrevocable and the offeree has acted in reliance on the offer." *Id.* art. 16, para. 2(b).

47. J. GHESTIN, *supra* note 39, No. 217 at 166; J. CARBONNIER, *supra* note 39, No. 15.

d. Verbal Modifications of the Contract

The Convention provides that a written contract that stipulates that any modification or termination by agreement of the parties must be made in writing "may not be otherwise modified or terminated" by agreement.[48] Under common law, the concept of detrimental reliance serves as a significant exception to the redundant rule, but to those more familiar with the civil law the detrimental reliance exception is a surprising one. In this respect, however, the Convention follows the common law approach by including a provision[49] similar to that of the Uniform Commercial Code.[50]

e. Fundamental Breach

A breach giving rise to the right to cancel the contract, known in American law as "material breach," is called "fundamental breach" in the treaty.[51] Under French law, the cancellation of a sale is open to the purchaser only in the most serious cases.[52]

f. Nonjudicial Termination as of Right

In contrast to French law, under which contracts may only be terminated by judicial action in the absence of a specific provision to the contrary,[53] the Convention adopts the system, also used in the Uniform Commercial Code,[54] which permits termination by simple notification.[55]

g. Anticipatory Breach

According to article 71, paragraph 1 of the Convention, a party may suspend the performance of its obligations in case of anticipatory breach.[56]

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48. Convention, *supra* note 1, art. 29, para. 2.

49. "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." *Id.*

50. U.C.C. § 2–209 (2).

51. Article 25 of the Convention defines it as a breach which . . . 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.

52. III P. MALAURIE, *supra* note 39, at 288 (1984) (VENTES).

53. J. CARBONNIER, *supra* note 39, No. 80; III P. MALAURIE, *supra* note 39, at 288.

54. *See, e.g.*, U.C.C. § 2–608.

55. Convention, *supra* note 1, art. 26. Such termination is of course possible in cases of fundamental breach, because that is the function of this concept. But it is equally applicable in cases of failure to deliver, failure to pay, or failure to accept delivery, even if such acts do not result in fundamental breaches, probably because such failures could turn out to be nothing more than delays without foreseeable consequences. Convention, *supra* note 1, arts. 49, 64.

In such cases, all that is necessary is that the party who intends to terminate the contract put the other party on notice to perform his obligation by means of a type of notification unknown in French law, and borrowed from German law, known as "Nachfrist." "[Either party] may fix an additional period of time of reasonable length for performance by [the other party] of his obligations." *Id.* arts. 47, 63.

56. 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

Article 72 allows a party to declare the contract avoided if it is clear that the other party "will commit a fundamental breach of the contract."[57] These notions are closer to that of "anticipatory repudiation" of the Uniform Commercial Code[58] than to the French *exceptio non adempleti contratus,* which allows a party to suspend performance of its obligations whenever the other party has not performed its own overdue obligations.[59]

h. Right to Cover and Right to Cure

Although unknown in the Civil Code, French jurisprudence recognizes a purchaser's right to cover when the seller does not perform its duty to deliver.[60] The right to cover in the Convention[61] is directly derived from that found in the Uniform Commercial Code.[62]

The right to cure,[63] also directly borrowed from the Uniform Commercial Code,[64] has no close equivalent in French law.

i. Mitigation

The buyer would be well-advised to utilize the right to cover because of its obligation to mitigate its damages, another concept traditionally found in the common law and adopted by the Convention.[65] French law does not

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of: (a) a serious deficiency in his ability to perform or in his credit worthiness; or (b) his conduct in preparing to perform or in performing the contract.

Convention, supra note 1, art. 71, para. 1.

57. "If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided." *Id.* art. 72.

58. U.C.C. § 2-610.

59. J. CARBONNIER, *supra* note 39, No. 84; J. GHESTIN, *supra* note 39, No. 12, at 8; R. WEILL & F. TERRE, DROIT CIVIL, LES OBLIGATIONS No. 465 (1980).

60. II-1 H.L. & J. MAZEAUD, *supra* note 29, No. 934; 111-12 *id.* No. 947.

61. 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.

Convention, *supra* note 1, art. 75.

62. U.C.C. § 2-712.

63. If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or makeup any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any nonconforming 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.

Convention, *supra* note 1, art. 37.

1. Subject of 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 or 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. *Id.* art. 48, para 1.

64. U.C.C. § 2-508.

65. 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. *Id.* art. 77.

recognize such a principle, although it has recently emerged as a general principle of international business law, especially in arbitration cases.[66]

j. Excuse for Nonperformance

Finally, the Convention excuses all nonperformance of the parties in case of an unforeseen hindrance independent of their will, whereas the Uniform Commercial Code reserves such excuse only for the seller in cases of late or nondelivery,[67] at least when such problems are not reasonably surmountable. In doing so, the Convention adopts a solution more flexible than that of the French *force majeure*.[68]

Anglo-American concepts and mechanisms of reasoning unknown in the French legal system and adopted by the Convention are numerous. If further convincing is needed as to the influence of these concepts on the drafters of the Convention, it suffices simply to count the number of times the word "reasonable" is utilized.

If harmonization is to be sought in the Convention's application, as article 7 suggests, practitioners and courts in non-common law jurisdictions, faced with interpreting and applying such unknown concepts, must endeavor to reach the same results as their Anglo-American counterparts. Such a result, however, is unlikely because the latter are applying the new treaty law as integrated into their common law legislation.

2. *The Application of Dual Sets of Rules: Gap-Filling by Domestic Law*

As mentioned above, the problem of applying the Convention does not involve only the interpretation of foreign concepts in a legal system into which they are supposed to be inserted. For a certain number of questions not dealt with by the Convention, courts will have to consult the domestic law designated as applicable by their rules of conflict of laws.

Even if French law were applicable, it may be expected that counsels for American parties will utilize it as they utilize the common law with respect to the Uniform Commercial Code. Section 1–103 of the Uniform Commercial Code expressly falls back on "principles of law and equity" for any question not expressly settled by it. In a recent conference, Professor Honnold cites such recourse as being among the national experiences that should not be allowed by practice.[69] An example of this is the

66. S. Jarvin, L'Obligation de coopérer de bonne foi, in L'APPORT DE LA JURISPRUDENCE ARBITRALE 169 (ICC Publishing 1986); Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 1979 J. DROIT INT'L 475.

67. U.C.C. § 2-615.

68. J. THIEFFRY & C. GRANIER, *supra* note 1.

69. Honnold Address, *supra* note 19.

Convention's express referral to the applicable municipal law in order to determine whether specific performance can be ordered or not.

Two examples relative to the validity of the contract and its provisions, which is not controlled by the Convention, confirm that, even in an auxiliary role, American law should be preferred over French law.

a. Nondeterminant Price

Nondetermination of the price may cause the cancellation of an international sale of goods governed by the Convention because, despite its liberality, article 6 provides that courts should look to the domestic law designated by their rules of conflict of laws to find a response to questions of validity. Should, however, sales contracts without determined price be valid under the applicable domestic law, the Convention, like the Uniform Commercial Code,[70] explicitly would allow the missing term to be supplied, as it provides in 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.

If, on the other hand, the law applicable is that of France, and the price is neither determined nor determinable, the contract is void,[71] and article 55 is of no help. The lack of flexibility in the French law works against its application in this regard.

b. Disclaimers of Warranty

As mentioned above, the Convention does not expressly govern disclaimers or limitations of warranty. French domestic law declares that such clauses may not be enforced against buyers who are not professionals of the same specialty as the sellers,[72] whereas the Uniform Commercial Code will give effect to such clauses as long as they are reasonable and are conspicuously brought to the attention of the buyer.[73] Of course, it is not certain that any of these internal provisions is applicable within the treaty regime. Professor Honnold considers that the Uniform Commercial Code provision just cited should not be applicable because it deals with warranties of merchantability that are not provided for in the Conven-

70. U.C.C. § 2–305.

71. III-2 H. L. & J. MAZEAUD, *supra* note 29, at 862; DROIT CIVIL, CONTRATS SPECIAUX (VENTES) 225.

72. *See supra* note 29.

73. U.C.C. § 2–316.

tion.[74] Instead, it is nonconformity that is governed by the Convention and gives rise to a legal obligation. Moreover, section 2–316 of the Uniform Commercial Code is regarded as a rule of interpretation not governing the validity of provisions. Other commentators are more circumspect in this regard.[75] In any case, most practitioners will not wish to run the risk of seeing their disclaimers of warranty, or other stipulations they consider essential, stripped of effect by the auxiliary application of French domestic law when they can ensure their validity by expressly choosing American law and taking certain simple precautions.

II. Preferability of the New American Treaty Law over the Uniform Commercial Code

If, in a choice of law clause, the law of one of the forty-nine states that have adopted the Uniform Commercial Code is designated, one must still decide whether or not to exclude the application of the Convention. Since the Uniform Commercial Code is somewhat different—and may be differently interpreted—from one state to another, it might seem preferable, in order to limit the disagreements, to try to diminish its role that might possibly result from these differences by designating a truly uniform law such as the Convention. The reasons set forth above, however, warrant doubts about the Convention's chances for uniformity of interpretation, even if its article 7 makes this one of its objectives.

If the choice is made not to exclude the application of the Convention, it should be because the Convention, despite its own imperfections as discussed in subsection B below, eliminates certain features of American domestic law that may be too specific (as discussed in subsection A below).

A. The Advantages of the Convention Compared to the Uniform Commercial Code

The advantages of the treaty law over the Uniform Commercial Code may be illustrated by three examples.

Greater Irrevocability of Offers. In contrast to the rigorous conditions for preventing the revocation of the offer imposed by section 2–205 of the Uniform Commercial Code, article 16(2)(a) of the Convention provides: "an offer cannot be revoked: . . . if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; . . ." Thus, the Convention is closer to civil law, where the offer generally cannot be

74. J. Honnold, *supra* note 1.
75. J. Thieffry & C. Granier, *supra* note 1.

revoked when an option deadline or duration of validity was specified or any other sign of its firm character can be found,[76] than the common law's absolute revocability for want of consideration. A large number of businessmen acting on the international market are ignorant of the common law approach to offer, and the Convention's drafters would have been ill-advised to adopt a system permitting easy revocability of offers.

Absence of Formalism. It is somewhat surprising to a French practitioner to learn that the Uniform Commercial Code requires that certain sales of merchandise, notably those over U.S. $500 in value be made in writing.[77] Such a writing is not required in commercial matters under French law.[78]

The Convention is fortunately less formalistic in this respect,[79] since it provides in article 11: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any requirement as to form. It may be proved by any means, including witnesses."

Foreclosure of Actions for Nonconformity. It was mentioned above that article 39 of the Convention provides for the lapse of the buyer's right to avail himself of a lack of conformity: "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." This time period is shorter than the four-year limitation period of Uniform Commercial Code Section 2–725, and is therefore preferable for the seller.

76. Such is the French law, *see* II-1 H. L. & J. MAZEAUD, *supra* note 29, No. 135; III-2 *id.*, No. 792; J. THIEFFRY & C. GRANIER, *supra* note 1, at 66.

77. U.C.C. § 2–201.

78. Under French law, a writing is required only for sales of certain things, mainly real estate (for which the contract must furthermore be entered into before a public officer called "notaire"), ships, boats and airplanes, etc. *See* III–2 H. L. & J. MAZEAUD, *supra* note 29, No. 776. This is not a condition of the contract's validity, however, but only of its effect towards third parties. Proof of sales agreements can be offered by any means against a merchant, but Law no. 525 of July 12, 1980, requires a writing for the proof of all sales above 5,000 French francs against nonmerchants. It thus modified article 1348 of the Civil Code and provides for exceptions where such a writing is not available. *See* III–2 H. L. & J. MAZEAUD, *supra* note 29, No. 775. For a comparison with American law, see C. LECUYER-THIEFFRY & P. THIEFFRY, *supra* note 1, at 141–42.

79. Neither the United States nor France has made the declaration of article 96, which allows Contracting States whose legislation requires writings to declare that the conclusion, modification, termination, offer, acceptance or any other indication of intent must be made in writing by derogation of articles 11 and 29 and part 2 of the Convention. Article 96 has been drafted in order to allow more formalistic countries, such as the USSR, to become parties to the Convention notwithstanding their desire to maintain their domestic law's requirement of writings.

B. Imperfections of the New American Law of International Sales

The differences between the Convention and the Uniform Commercial Code are less severe and numerous than those between the Convention and French law and, in certain circumstances, the exclusion of the Convention may undoubtedly be envisioned. This may be so particularly in cases of contracts involving large sums of money, for which the greater foreseeability resulting from the existence of a developed jurisprudence constitutes a more attractive benefit than the somewhat illusory one of a uniform law. Large American and European corporations have already modified their terms and conditions of sale to exclude the Convention, preferring to consider the possible applicability of the treaty law during the course of negotiations, if at all. The reasoning behind this approach is apparently that it is desirable to subject the contract to one's own law, since it is both better understood and endowed with a well-established jurisprudence.

A further rationale to this position, however, can be deduced from the terms of the Convention, which contain weaknesses resulting from the compromises necessary to achieve its ratification by a large number of states with law belonging to different legal systems. These weaknesses appear even when the law of an American state is applicable to issues not settled by the Convention.

1. *Uncertainty of the Formation of the Contract*

The principal source of uncertainty has been evoked above. It arises from the adoption of the system of the counter-offer, where the existence of the contract depends on the importance of the contradictions between the stipulations of the parties.

A less serious, but nevertheless substantial source of uncertainty, is the adoption of the principle of conclusion of contracts upon receipt of the acceptance by the offeror: "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."[80]

On this point, the Convention adopts neither the French commercial law's approach[81] nor that of the common law,[82] preferring a rule less suitable to modern trade relationships.

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80. Convention, *supra*, note 1, art. 18, para. 2; *see also id.* arts. 23, 24.

81. Schmidt, *Négociation et Conclusion des Contrats*, Dalloz 90 (1982); II-1 H. L. & J. Mazeaud, *supra* note 29, No 143. In sales by a nonmerchant, however, the contract is formed upon receipt of the acceptance. *See* II-1 H. L. & J. Mazeaud, *supra* note 29, No. 143; III-2, *id.*, No. 783.

82. Lansing & Hauserman, *supra* note 1.

2. *Uncertainty as to the Validity of Certain Stipulations*

The above described liberality of the Convention does not suffice to prevent the application of mandatory provisions of the applicable domestic law. For example, the existence of the treaty law will not suffice to render an otherwise invalid penalty valid.[83]

Similarly, it has been shown that serious doubt exists as to the enforceability of warranty disclaimer clauses that do not conform to the requirements of section 2–316 of the Uniform Commercial Code.[84] From the point of view of the French exporter, accustomed as it is to the absolute unenforceability of such clauses against purchasers that are not professionals of the same specialty as the seller, this is only a partial surprise. As indicated above, it is merely a minor inconvenience, as long as the exporter takes care to conform to the conditions of section 2–316 of the Uniform Commercial Code.

III. Conclusion

Three observations are necessary:

- It should not be forgotten that the Convention does not prevent in any way the application of rules developed for reasons of public policy, such as technical regulations, antitrust laws, and, of particular interest to foreign exporters to the United States, product liability. No doubt is possible on this subject, even concerning actions based on warranty, since article 5 of the Convention expressly provides that it does not apply "to the liability of the seller for death or personal injury caused by the goods to any person."
- The Convention does not eliminate potential problems between buyers and sellers of different countries, as is generally expected from uniform law, and it may not even diminish them. Careful negotiation and drafting of contracts will be more essential than ever. Civil law practitioners will be concerned by the adoption of the counter-offer, while those from common law countries may fear that contracts will be deemed concluded at times not expected by them, due to the absence of requirement of a writing. While the Convention does not address the issues relating to negotiations, the parties' behavior at

83. Even when they are excessive, penalty clauses are not invalid under the Civil Code. Nevertheless, article 1152 has been modified in 1975 to read: "[T]he court may moderate or increase an agreed upon penalty if it is manifestly excessive or insufficient. Any provision to the contrary is void." C. Civ. art. 1152.

84. H. L. & J. Mazeaud, note 29.

this early stage of their relationship is therefore likely to be affected by the Convention since most of them will not take the chance of a court finding that they have contracted at a time or upon terms of which they were not aware. American companies might take advantage of such a situation because they are more used than French businesses (as well as businesses from most civil law countries) to the extensive intervention of lawyers in the precontractual stage.

If nothing else, the Convention will change the legal context of French-U.S. sales of goods from the outset since it must be taken into account during the first steps of negotiations. Whether American or French law will govern the agreement, and whether the Convention's provisions should be excluded or not, must be ascertained in order to assess fully the parties' respective detriments and advantages.

A significant number of sellers and purchasers from both countries will not be aware of the Convention, at least for some time, as the specific features of French and American law are still ignored in too many instances. Under no circumstances should the choice of domestic French law be recommended, except from the viewpoint of a purchaser with very significant bargaining leverage. Even in instances where the Convention is not excluded, its provisions may be considered too different from those of French law to apply alternatively with them to the same contract.

Thus, the choice should be made between the Convention, with subsidiary resource to an American state's law for gap-filling, and the latter taken alone. Since the Convention represents an international consensus, which can fairly be presumed to represent a common nucleus of rules and principles acceptable for businesses of most countries, it is here suggested that it should preferably not be excluded. The difficulties described in the present article are unlikely to have more practical adverse effects on actual trade relationships than those ordinarily arising from differences between domestic laws and the misunderstandings that often result therefrom.