

E

Coming into effect of a contract

(1) A contract of sale is concluded only at the moment the contracting parties have agreed upon all items upon which agreement was to be achieved according to the will of one party.

(2) A contract of sale is concluded also in case that various conditions are invalid, if it is to be supposed that the parties would have concluded the contract even without these conditions.

F

Conditions precedent and subsequent

If a contract is entered into subject to a condition precedent or subsequent, it becomes effective or invalid upon fulfilment of the condition.

G

Approval by a third party or by the party represented

(1) If a contract has been concluded subject to the approval of a third party, it will become effective at the moment this approval is given.

(2) This will apply also in case the contract was concluded by a representative with reservation as to be approved by the person represented.

5. In many legal orders there is a clause on *culpa in contrahendo* (fault at formation of contract). It is therefore considered appropriate to add a second paragraph to article 5 of the draft Convention, which could read as follows:

“(2) In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it.”

6. The representatives of the German Democratic Republic at the eleventh UNCITRAL session will make additional verbal and written statements at the UNCITRAL session itself on matters of less principal importance than those set forth in paragraphs 3 and 4 of these observations.

7. Finally it is also suggested to conduct at the eleventh session of UNCITRAL an exchange of views on whether only *one* draft of the Convention should be submitted to the Diplomatic Conference of States, regulating both the formation and the contents of the contract on the international sale of goods or whether the above-mentioned separate draft conventions should be maintained.

V. COMMENTS BY THE INTERNATIONAL CHAMBER OF COMMERCE (A/CN.9/146/ADD.4)*

1. This addendum sets out the observations of the International Chamber of Commerce (ICC) which were received on 22 May 1978.

A. *Comments on the draft convention as a whole*

2. ICC has taken a favourable position both to the

1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and to the UNCITRAL draft Convention on the same subject-matter. Now, when an UNCITRAL draft Convention on the Formation of Contracts for the International Sale of Goods is under consideration, the general view of the Commission on International Commercial Practice of the ICC (hereafter referred to as the Commission) to the project will be very much the same. Unification of the law on the formation of contracts will be of practical value for the international trade and the greater the number of States adhering to any uniform rules the more useful they will become. The 1964 Hague Convention on Formation (ULF) represents by itself a remarkable piece of unification and is in the course of being ratified by a number of States in Europe, Asia and Africa. Contrary to ULIS, this Convention has never met with serious or widespread criticism. The Commission therefore regrets that the Working Group did not find it possible to follow the wording and the presentation of the subject-matter in ULF more closely.

3. The Commission reiterates its view expressed already in the ICC statement on the draft Convention on the International Sale of Goods (as prepared by the Special Working Group)¹ that the present efforts of unification must not without compelling reasons differ from what has already been achieved in 1964. It is also important that in the elaboration of the transitional provisions due consideration be given to the situation of States which have already ratified ULF 1964 and the difficulties for these States of replacing the earlier convention by a new one. If this is not the case, a considerable number of States may feel prevented from adhering to the new Convention or may postpone such adherence.

B. *Comments on the provisions of the draft Convention*

Sphere of application

4. The Commission refers to what was said in this respect in the said ICC statement on the draft Sales Convention. The provision that the Convention applies not only between parties from Contracting States but also when the rules of private international law lead to the application of the law of a Contracting State, may represent a useful compromise. The more clear-cut solution that the Convention applies only in the relationship between parties from different Contracting States should, however, be reconsidered.

Place of business

5. As said in the ICC statement, the Commission finds the provision relating to “place of business” inadequate. One and the same company may be said to have several “places of business” not only in different countries but also in one and the same country and the relevant place to send an answer to may be another than the place of business as defined for other purposes. The present provisions do not allow the identification of the relevant place of business satisfactorily.

¹ This statement is reproduced in document A/CN.9/125 (Yearbook...1977, part two, I, D).

* 23 May 1978.

Autonomy of the parties

6. Article 2 (1) provides that only "agreement" between the parties may exclude the application of the convention. However, a party wanting to negotiate a contract under its domestic law rules, e.g. by stating in a set of General Conditions appended to an offer that any contract is to be governed by that law, should be allowed to do so.

7. Further, prior practice between the parties or usage, generally, may exclude or substitute the application of particular rules in the convention without previous "agreement" thereon being necessary. This should be adequately reflected in article 2 (2).

Form

8. The provisions in the present draft deleting any requirements of form for the formation of a contract are in line with the provisions in the draft Sales Convention. The Commission refers to paragraphs 13 and 14 in the said ICC statement, but finds the present contents allowing a State to make a declaration/reservation on this point acceptable as a compromise.

Interpretation

9. Any distinction between interpretation of offers and acceptances on the one side and interpretation of contracts on the other is untenable or most futile and must be avoided. Neither the draft Sales Convention nor ULF (1964) contains any rules on interpretation of contracts, offers or acceptances, except that the relevance of usages is stressed. The Commission refers in that respect to what is said in the said ICC statement on usages and interpretation of trade terms (paras. 8-11).

10. To let one party's "intent" prevail over the regular ordinary meaning only because the other party *ought* to have understood that the first party expressed himself improperly, is not acceptable. The provisions on interpretation in article 4 could very well be deleted but if retained, a more "objective" standard of interpretation must be set up, e.g. as follows:

- (i) Communications, statements and declarations by and acts of a party shall be interpreted according to the meaning usually given to them in the trade concerned, or where no such particular meaning is given to them in the trade concerned, according to their ordinary meaning. However, if another but common (alternatively: "mutual" or "joint") intent of the parties can be established, such common intent shall prevail.
- (ii) A party may not rely on such usual or ordinary meaning as said in paragraph (1), if he knew or could not have been unaware of (alternatively: or ought to have known) that the other party understood such communication, statement, declaration or act differently.

Fair dealing and good faith

11. The Commission does not object to the inclusion of such provision in the convention. However, in some countries, Courts seem to be prepared to give such phrases a rather wide and wholly unpredictable interpretation and application. One might therefore also consider the deletion of this provision, particularly as it does not appear in the draft Sales Convention.

Usage

12. The Commission refers here to what was said in the said ICC statement (paras. 8-11) on usages and the remarks above to article 2 (2).

Offer

13. The effect of article 8 (3) now seems to be that an offer is sufficiently definite to make a contract upon acceptance if it only indicates the kind of goods, quantity and price. According to the Secretariat's commentary, however, it is always a matter of interpretation in the particular case whether the offeror intended to be bound upon acceptance. This may also be in accordance with general understanding in commercial relations where parties frequently expect more details of the bargain to be defined than the said ones before the contract can be considered as concluded. The present text should therefore be adjusted so as to correspond more closely on this point to the contents of the commentary.

Withdrawal and revocation of offer

14. In general, the compromise reached here between the legal systems in which an offer stands, at least for a reasonable time, and those in which an offer always can be revoked until it has been accepted, seems workable. However, one should reconsider whether the contents could not be presented in a more easily intelligible way. The distinction between withdrawal of offer and revocation of offer is puzzling and a consolidated article on when an offer lapses may be useful. Further, the rule that an offer cannot be withdrawn after it has "reached" the addressee seems too narrow if applied to letters or telex communications. The deadline should be the moment when the communication came to the knowledge of the addressee or when the addressee in some way acted thereupon.

Acceptance

15. The Commission wants to stress the importance of the rule that offers may be accepted by "other conduct" than oral or written declarations, e.g. by dispatch of the goods. Although silence in itself shall not amount to acceptance, it may do so in a given particular situation. The wording of article 12 (3) may also be too narrow and the more generous formulation in article 6 (2) of ULF preferable.

Additions or modifications to the offer

16. Here an important exception from the rule that silence does not amount to acceptance is introduced. Additional or different terms which do "not materially" alter the terms of the offer become part of the contract unless objected to. Such rule is acceptable only if the interpretation of the words "not materially" is kept within some, rather narrow limits. A clarification in that direction would be useful.

Late acceptance

17. It might be reconsidered whether or not the rule in article 15 (2) that late acceptance may nevertheless be effective unless objected to, should be given a wider application (narrowing thereby the application of the rule in para. 1).

Modification and rescission of contract

18. In sets of general conditions or in particular contracts, one meets rather frequently provisions saying that terms and conditions set out may not be modified unless in writing. Indeed, when a contract is made in writing, it is a matter of order and good business routine to have any changes and modifications therein recorded in writing. Such provisions are usually understood or applied as recommendations. That a failure to observe them should result in making a modification orally agreed upon null and void would, however, be a rather harsh sanction. It may lead to considerable inequities which cannot entirely be removed by the help of the rule of estoppel in the last sentence of article 18 (2). Such a rule would also not be in accordance with the

overruling policy in the convention, article 3, opposing requirements of written form in the formation of a contract. The Commission suggests therefore that the present provision which has no counterpart in ULF (1964) be deleted. Even if such rule is deleted, a contractual provision of this kind would not be entirely without effects. It would usually establish a presumption against the parties maintaining that the oral agreement modifying the main contract has been concluded.

C. Comments on the UNIDROIT draft

19. The UNIDROIT draft rules relating to the validity of contracts which the Working Group has not included in its draft do not give rise to any particular comments.

G. List of relevant documents not reproduced in the present volume

WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS, NINTH SESSION

<i>Title or description</i>	<i>Document Symbol</i>
Provisional agenda and annotations	A/CN.9/WG.2/L.4
Article 14, as adopted by the Working Group on first reading	A/CN.9/WG.2(IX)/CRP.1
Proposal by the representative of France, article 14	A/CN.9/WG.2(IX)/CRP.2
Proposal by the representative of Ghana, article 2	A/CN.9/WG.2(IX)/CRP.3
Proposal by the representative of the United Kingdom, article 2	A/CN.9/WG.2(IX)/CRP.4
Proposal by the representative of France on the meaning of silence	A/CN.9/WG.2(IX)/CRP.5
Proposal by the representative of the Union of Soviet Socialist Republics, article 3	A/CN.9/WG.2(IX)/CRP.6
Proposal by the representative of the Union of Soviet Socialist Republics, articles 3A, (X), 8 and 12	A/CN.9/WG.2(IX)/CRP.7
Proposal by the representative of the United Kingdom, article 5	A/CN.9/WG.2(IX)/CRP.8
Proposal by the representative of Japan, article on public offers	A/CN.9/WG.2(IX)/CRP.9
Article 1, as adopted by the Working Group on first reading	A/CN.9/WG.2(IX)/CRP.10
Article 4, as adopted by the Working Group on first reading	A/CN.9/WG.2(IX)/CRP.11
Draft report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977)	A/CN.9/WG.2(IX)/CRP.12 and Add. 1-11
Proposal by the representative of Czechoslovakia, articles 10A and 10B	A/CN.9/WG.2(IX)/CRP.13
Proposal by the observer of the International Chamber of Commerce, article 14	A/CN.9/WG.2(IX)/CRP.14
Report of the Drafting Group	A/CN.9/WG.2(IX)/CRP.15 and Add. 1 and 2