Article 4

1. In applying the preceding article due consideration shall be given to all relevant circumstances, including any negotiations between the parties, any practices which they have established between themselves, any usages which reasonable persons in the same situation as the parties usually consider to be applicable, the meaning usually given in any trade concerned to any expressions, provisions or contractual forms which are commonly used, and any conduct of the parties subsequent to the conclusion of the contract.

2. Such circumstances shall be considered, even though they have not been embodied in writing or in any other special form; in particular, they may be proved by witnesses.

3. The validity of any usage shall be governed by the applicable law.

Article 5

There is no contract if, under the provisions of the preceding articles, an agreement between the parties cannot be established.

Article 6

A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

(*a*) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

(*b*) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance; and

(*c*) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

Article 7

1. A mistake of law shall be treated in the same way as a mistake of fact.

2. A mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated.

Article 8

A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded.

Article 9

The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods.

Article 10

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided for fraud if the other contracting party knew or ought to have known of the fraud.

Article 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

Article 12

1. Avoidance of a contract must be by express notice to the other party.

2. In the case of mistake or fraud, the notice must be given promptly, with due regard to the circumstances, after the party relying on it knew of it.

3. In the case of threat, the notice must be given promptly, with due regard to the circumstances, after the threat has ceased.

Article 13

1. In case of mistake, any notice of avoidance shall only be effective if it reaches the other party promptly.

2. In any event, the notice shall only be effective if it reaches the other party within two years after the conclusion of the contract in the case of mistake or within five years after the conclusion of the contract in the other cases.

Article 14

1. Notice of avoidance shall take effect retroactively, subject to any rights of third parties.

2. The parties may recover whatever they have supplied or paid in accordance with the provisions of the applicable law.

3. Where a party avoids a contract for mistake, fraud or threat, he may claim damages according to the applicable law.

4. If the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake.

Article 15

1. If the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. He must make such a declaration promptly after having been informed of the manner in which the mistaken party had understood the contract.

2. If such a declaration is made, the mistaken party shall thereupon lose his right to avoid the contract and any other remedy. Any declaration already made by him with a view to avoiding the contract on the ground of mistake shall be ineffective.

Article 16

1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller.

D. Report of the Secretary-General: commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods (A/CN.9/144)*

Introduction

1. The Working Group on the International Sale of Goods was established at the second session of the United Nations Commission on International Trade Law. At that session, the Commission at its 44th meeting on 26 March 1969 requested the Working Group to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the Formation of

* 22 November 1977.

Contracts for the International Sale of Goods might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications.[1] At its third session the Commission decided that the Working Group should commence its work on formation of contracts when it had completed its work on the revision of the Uniform Law on the International Sale of Goods.[2]

2. The Working Group completed this mandate at its ninth session by adopting a draft Convention on the formation of contracts for the international sale of goods (A/CN.9/142/Add.1)*

3. The draft Convention will be considered by the United Nations Commission at its eleventh session in 1978. To facilitate that consideration, the Working Group requested the Secretary-General to prepare a commentary on the draft Convention and to circulate the draft Convention together with the commentary to Governments and interested international organizations for their comments.[3]

COMMENTARY ON THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS APPROVED BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AT ITS NINTH SESSION

PART I. SUBSTANTIVE PROVISIONS

Chapter I. Sphere of application

Article 1. Scope

(1) This Convention applies to the formation of 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 offer, any reply to the offer, 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 proposed contract is to be taken into consideration.

(4) This Convention does not apply to the formation of contracts of sale:

(*a*) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(*b*) By auction;

(*c*) On execution or otherwise by authority of law;

(*d*) Of stocks, shares, investment securities, negotiable instruments or money;

(*e*) Of ships, vessels or aircraft;

(*f*) Of electricity.

(5) This Convention does not apply to the formation of contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(6) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

7. 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 proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Limitation Convention), articles 2, 3, 4, 6.

Draft Convention on the International Sale of Goods as adopted by the United Nations Commission on International Trade Law at its tenth session (CISG), articles 1, 2, 3, 5.

Commentary

1. This article states the rules for determining when this Convention is applicable to the formation of a contract of sale of goods and sets out those contracts the formation of which is excluded from the application of this Convention.

2. Article 1 reproduces articles 1, 2, 3 and 5 of CISG with such minor changes as are necessary for it to apply to the formation of a contract rather than to the contract itself. By using the identical words of CISG, with the minor changes indicated in paragraph 7 below, it is intended that, if the Contracting States designated by article 1 (1) of this Convention are also Contracting States to CISG, the formation of a contract of sale would be subject to this Convention and the contract which results would be subject to CISG.

3. In general, the comments made on the various provisions in the commentary on CISG[4] are applicable to article 1 of this Convention and need not be repeated. However, a special comment is in order in respect of article 1 (1) (*b*).

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* Reproduced in this volume, part two, I, A, annex.

[1] UNCITRAL, report on the second session (1969), A/7618 (Yearbook... 1968-1970, part two, II, A).

[2] UNCITRAL, report on the third session (1970), A/8017 (Yearbook... 1968-1970, part two, III, A).

[3] Report of the Working Group on the International Sale of Goods on the work of its ninth session, A/CN.9/142, para. 304 (reproduced in the present volume, part two, I, A).

[4] A/CN.9/116, annex II (Yearbook... 1976, part two, I, 3).

Private international law, paragraph (1) (b)

4. If the rules of private international law designate the law of a Contracting State as the law to be applied, the question is which law of that State governing the formation of contracts of sale of goods is to be applied: the domestic law or this Convention. If the parties to the contract have their places of business in different States, the appropriate law is this Convention.

5. Some legal systems apply the law of different States to different elements of the formation process such as the offer, the acceptance and the required form. In these States, it may not be possible to say that the rules of private international law would designate the law of any single State as the law governing the formation of the contract.

6. However, in those States whose rules of private international law designate a single law to regulate the matters governed by this Convention, if those rules designate the law of a Contracting State, this Convention is the law to be applied.

Differences between this convention and CISG

7. The differences between the text of this Convention (Formation) and CISG (Sales) in respect of the scope of application are as follows:

Formation		*Sales*	
Citation	*Text*	*Citation*	*Text*
Art. 1 (1)	"to the formation of contracts"	Art. 1 (1)	"to contracts"
Art. 1 (1)	"between parties"	Art. 1 (1)	"entered into by parties"
Art. 1 (2)	"either from the offer, any reply to the offer"	Art. 1 (2)	"either from the contract"
Art. 1 (3)	"or of the proposed contract"	Art. 1 (3)	"or of the contract"
Art. 1 (4)	"to the formation of contracts of sale"	Art. 2	"to sales"
Art. 1 (4) (*a*)	"at any time before or at the conclusion of the contract"	Art. 2 (*a*)	"at the time of the conclusion of the contract"
Art. 1 (5)	"to the formation of contracts"	Art. 3 (1)	"to contracts"
Art. 1 (6)	"The formation of contracts . . . is to be considered as the formation of contracts of sale of goods"	Art. 3 (2)	"Contracts for . . . are to be considered sales"
Art. 1 (7) (*a*)	"to the proposed contract"	Art. 5 (*a*)	"to the contract"
Art. 1 (7) (*a*)	"at any time before or at the conclusion of the contract"	Art. 5 (*a*)	"at the time of the conclusion of the contract"

Article 2. Autonomy of parties

(1) The parties may agree to exclude the application of this Convention.

(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 2.

Limitation Convention, article 3 (3).

CISG, article 4.

Commentary

1. Article 2 recognizes the general principle of party autonomy. Although slightly different in presentation from article 4 of CISG, paragraphs (1) and (2) of this article state the same basic rules as are set forth in that Convention.

Exclusion of the application of the Convention, paragraph (1)

2. Paragraph (1) states that the parties may agree to exclude the application of the Convention as a whole. The most likely manner in which the parties would act to exclude the application of this Convention would be by the choice of the law of a non-Contracting State to govern the formation of the contract. It would be a matter of interpretation of the intention of the parties in a given case as to whether the choice of the law of a non-Contracting State to govern "the contract" was also a choice of that law to govern the formation of the contract.

3. If the parties exclude the application of this Convention without specifying the law to be applied, the rights and obligations of the parties in respect of the formation of the contract would be governed by the law made applicable by the rules of private international law.

Derogation from the provisions of this Convention, paragraph (2)

4. Paragraph (2) enables the parties, unless the Convention otherwise provides, to agree to derogate from or vary the effect of any of the individual provisions of this Convention.

5. Such a derogation from or variation of the effects of this Convention can occur only by agreement of the parties. It was not considered to be appropriate to allow one party, who would normally be the offeror, to change by his unilateral act the rules provided by this Convention as to the formation of the contract.

6. By necessity the agreement between the parties in respect of any derogation of this Convention must

precede the conclusion of the contract of sale. If agreement as to the rules to be followed in respect of the formation of the contract was reached as part of the conclusion of the contract of sale itself, that agreement would become binding on the parties only if the contract of sale was concluded. A decision as to whether that contract was concluded could be reached only under the applicable law, which law would be this Convention if, according to article 1, the formation of the contract came within the scope of application of this Convention.

7. Such prior agreement will exist in many cases. Parties often agree to use standard contract forms or general conditions of sale prior to agreement on the specific elements of the contract, such as the quantity or the price of the goods, and such forms and general conditions often include provisions in respect of the formation of the contract. Agreement may also be found from the past practice of these parties or from the existence of a usage in the trade to use such forms or general conditions.

8. It should be noted that a number of articles in this Convention anticipate that the offeror by his unilateral act can effectively provide a different rule from the normal rule as it is set forth in that article. For example, article 8 (2) provides that "a proposal other than one addressed to one or more specific persons" is to be considered merely as an invitation to make offers. However, if the offeror clearly indicates that the proposal is to be considered as an offer, it will be so considered if it meets the other criteria set forth in article 8. Similarly, article 12 (3) makes it clear that if the offer indicates that it may be accepted by the performance of an act, such as one relating to the shipment of the goods without notice to the offeror, such an acceptance is effective at the moment the act is performed even though the normal rule under article 12 (2) is that an acceptance is effective at the moment the indication of assent reaches the offeror.

9. However, if the article does not specifically allow for such a derogation from the normal rule, that rule can be derogated from or its effect can be varied only by the prior mutual agreement of the parties.

10. It should be noted that article 13 cannot be used to achieve a contrary result. If article 13 were understood to mean that the offeror could specify in the offer a method of acceptance different from that provided by this Convention which had to be followed by the offeree, it would mean that the offeror could unilaterally derogate from or vary the effect of the provisions of this Convention.

Example 2A: Clause 2.1 of the Economic Commission for Europe General Conditions No. 574 for the Supply of Plant and Machinery for Export provides that "The contract shall be deemed to have been entered into when, upon receipt of an order, the Vendor has sent an acceptance in writing within the time-limit (if any) fixed by the Purchaser". This clause would derogate from the provisions of this Convention in two respects: first, the acceptance must be in writing, whereas article 3 (1) provides that the contract need not be in writing and may be proved by any means, including witnesses and, second, the acceptance will be effective when sent rather than when it reaches the offeror as provided in article 12 (2).

Example 2A.1: In the negotiations leading to the eventual offer the parties agreed to contract on the basis of the ECE General Conditions No. 574. In this case clause 2.1 would be applicable. Therefore, the acceptance would have to be in writing and, if so made, it would be effective when sent.

Example 2A.2: Nothing was said in the negotiations leading to this contract about the use of ECE General Conditions No. 574. However, in the past it had been established that the parties expected to rely upon those General Conditions and had, in fact, referred to them as governing the performance of other contracts in which there had been no mention of them in the negotiations. In this case, in determining the intent a reasonable person would have had in respect of the conclusion of the contract, it might be found under article 4 (3) that the parties intended to rely upon ECE General Conditions No. 574. If this intent were found, clause 2.1 would be applicable. Therefore, the acceptance would have to be in writing and, if so made, it would be effective when sent.

Example 2A.3: A sent to B an order for goods and attached ECE General Conditions No. 574, stating that they constituted part of the offer. This was the first time these two parties had ever communicated with each other. B accepted the offer by telephone. The acceptance was effective even if A protested that the acceptance had to be in writing since, at the time of the acceptance, there was no agreement between the parties to use clause 2.1 in order to derogate from or vary the effect of this Convention.

Example 2A.4: As in example 2A.3, A sent to B an order for goods and attached ECE General Conditions No. 574, stating that they constituted part of the offer. This was the first time these two parties had ever communicated with each other. B accepted the offer in writing. The acceptance was effective at the moment it reached the offeror, as provided in article 12 (2), not at the moment sent as provided in ECE General Conditions No. 574. If this was not the result, there would be the difficult conceptual problem that the agreement of the parties to be bound by the provisions of clause 2.1 of ECE General Conditions No. 574 would be effective under this Convention at the time the acceptance reached the offeror, and that as a consequence the acceptance of the offer in respect of the contract of sale would be effective at the earlier moment when it was sent.

Silence as acceptance, paragraph (3)

11. Article 2 (3) states a general rule that a term of the offer which stipulates that silence shall amount to acceptance is not effective. However, such a term in the offer can be effective if the parties have previously so agreed. Such an agreement may be explicit or it may be established by an interpretation of the intent of the parties as a result of the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties as provided by the rules of interpretation in article 4.

12. Article 2 (3) must be read in conjunction with article 12 (1) which provides that "Silence shall not in itself amount to acceptance". That provision indicates that silence when coupled with something else may amount to acceptance.

Example 2B: For the past 10 years the buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders the seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question the seller neither shipped the goods nor notified the buyer that he would not do so. The buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that the seller did not need to acknowledge the order and, in such a case, the silence of the seller constituted acceptance of the offer.

Example 2C: One of the terms in a concession agreement was that the seller was required to respond to any orders placed by the buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by the seller. On 1 July the seller received an order for 100 units from the buyer. On 25 July the seller notified the buyer that he could not fill the order. In this case a contract was concluded on 15 July for the sale of 100 units.

Chapter II. General provisions

Article 3. Form

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

(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

Uniform Law on the International Sale of Goods (ULIS), article 15.

ULF, article 3.

CISG, article 11.

Commentary

1. Article 3 is virtually identical to article 11 of CISG.

2. Although contracts for the international sale of goods are usually in writing, the fact that many contracts are concluded by modern means of communication which do not always involve a written contract led to the decision to include this provision. However, the rule that the contract need not be in writing is subject to three exceptions.

3. Firstly, the parties may agree prior to the conclusion of the contract that the contract must be in writing. If they so agree, their agreement takes precedence over the terms of this Convention. See example 2A, and especially example 2A.1.

4. Secondly, any administrative or criminal sanctions for breach of the rules of any State requiring that contracts for the international sale of goods be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract. However, the contract itself would be enforceable between the parties.

5. Thirdly, under article (X) a State whose legislation requires a contract of sale to be concluded in or evidenced by writing may make a declaration to the effect that article 3 (1) shall not apply to any sale involving a party having his place of business in a Contracting State which has made such a declaration. Such a declaration does not reverse the rule in article 3 (1) and create a requirement under this Convention that the contract be concluded in or evidenced by writing. Instead, it has the effect of eliminating from this Convention any rule on the subject of the form in which those contracts must be concluded or evidenced, leaving the determination of the issue to the applicable national law as determined by the rules of private international law of the forum.

6. The last sentence of article 3 (2) makes it clear that the individual parties to the transaction may not by their private agreement derogate from the effect of such a declaration.

*Article 4. Interpretation**

(1) Communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was.

(2) If the preceding paragraph is not applicable, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

PRIOR UNIFORM LAW

ULIS, article 9 (3).

ULF, articles 4 (2), 5 (3), 11 and 13 (2).

UNIDROIT Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods (draft Law on Validity), articles 3, 4 and 5.

Commentary

Scope of application

1. Article 4 on interpretation, as is the case with all of the provisions in this draft Convention, relates only to the formation process. This article does not provide rules for interpreting the contract of sale, once a contract of sale has been concluded.

* The Working Group on the International Sale of Goods noted that article 4 had no equivalent in the draft Convention on the International Sale of Goods.

2. Questions of interpretation can arise in a number of ways in the formation process. It may be necessary to determine whether a given communication which appeared to be "sufficiently definite" to be an offer under article 8 also "indicate[d] the intention of the offeror to be bound in case of acceptance". Or, the offeror and the offeree may use identical words in the purported offer and acceptance but collateral evidence may make it clear that they did not understand those words in the same way. Conversely, the communications between the parties may themselves not contain the information necessary for an offer and an acceptance, but extrinsic evidence may contain the missing information. In all these cases the rules of interpretation may be called on to help in the determination whether there has been sufficient agreement between the parties to decide that a contract has been concluded.

Example 4A: A sent B a letter stating that he offered to sell equipment to be manufactured with the only specifications being the kind and quantity of the goods and a price of Swiss francs 10,000,000. It would normally be the case that a seller would not be expected to contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters raises the question of interpretation of the letter as to whether the seller had the intention to be bound to a contract in case of acceptance.

Example 4B: The parties agreed upon the sale of cotton to arrive "ex Peerless" from Bombay without either party realizing that there were two ships named "Peerless" leaving Bombay several months apart. The buyer had in mind the ship that sailed in October, and the seller had in mind the ship that sailed in December. Therefore, by interpretation of the offer and the purported acceptance it was evident that there was no agreement on the subject-matter of the sale, the cotton on the October "Peerless" or the cotton on the December "Peerless" and, therefore, that there was no contract.

Example 4C: A sent B a telegram stating "Will send 100". B replied "Agreed". Although such a cryptic exchange of messages does not by itself have sufficient content to constitute an offer and an acceptance, by the use of the rules of interpretation in article 4, and especially the past practices of the parties, adequate meaning might be given to the exchange of telegrams to find that a contract existed.

Content of the rules of interpretation

3. Since article 4 is for the interpretation of the communications, statements and declarations by and conduct of the parties for the purposes of determining whether a contract exists, it cannot be said that there is an actual common intent of the parties. However, article 4 (1) recognizes that the other party often knows or ought to know the intent of the party who sent the communication or engaged in the conduct in question. Where this is the case, that is the meaning to be given to that communication or conduct.

4. If the party who sent the communication or engaged in the conduct had no intention on the point in question or if the other party did not know what that intent was, article 4 (1) cannot be applied. In such a case, article 4 (2) provides that the communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

5. It would be rare if neither article 4 (1) nor article 4 (2) could be applied. However, in a rare case, such as that in example 4B, neither party would have known or ought to have known the other party's intent and a reasonable person would not have been able to establish a meaning to the words used. In such a situation a tribunal would be required to find that there had not been the agreement on the subject-matter of the contract necessary for the conclusion of a contract.

6. In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question. It is common experience that a person may dissimulate or make an error and the process of interpretation set forth in this article is to be used to determine the true content of the communication. If, for example, a party offers to sell a quantity of goods for Swiss francs 50,000 and it is obvious that the offeror intended Swiss francs 500,000 and the offeree knew or ought to have known it, the price term in the offer is to be interpreted as Swiss francs 500,000 for the purpose of determining whether a contract has been concluded.

7. In order to go beyond the apparent meaning of the words or the conduct by the parties, article 4 (3) states that "due consideration is to be given to all relevant circumstances of the case". It then goes on to enumerate some, but not necessarily all, circumstances of the case which are to be taken into account. These include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

8. Since article 4 applies only to the interpretation of the words and conduct of the parties for the purposes of determining whether and when a contract was concluded, the provision in article 4 (3) that the negotiations between the parties are among the circumstances to be used to interpret those words and conduct does not raise the problems which it would if the negotiations were to be used to determine the meaning of the contract.

9. Article 4 is particularly useful in cases such as that in example 4C. Although the specific communication which is the offer does not contain the elements necessary for the offer to be "sufficiently definite" under article 8, the negotiations give the missing content and an offer exists.

10. However, it is a complex and perhaps insoluble problem to determine the extent to which preliminary agreements or statements made during the process of negotiations should be used to explain, to supplement or to contradict the words of "the contract" in order to determine its substantive content. None of these problems are raised by article 4.

11. Similarly, the potentially difficult theoretical problems of interpreting the substantive content of the contract by the subsequent conduct of the parties is not raised by article 4 (3). However, if the subsequent con-

duct of the parties shows that the "offeror" intended to be bound in case of acceptance, even though the "offer" was not clear in that respect, or that the two parties understood that the cotton sold in example 4B was the cotton on the October "Peerless", this conduct is to be taken into account in determining that a contract was concluded.

*Article 5. Fair dealing and good faith**

In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith.

PRIOR UNIFORM LAW

None.

Commentary

1. This article sets forth in general form a basic principle which runs throughout this Convention. The principle involved is that in the formation of contracts of international sale of goods, as in all commercial transactions, the parties must observe the principles of fair dealing and act in good faith.

2. There are a number of specific applications of this principle in particular provisions of this Convention such as article 2 (3) which makes ineffective, unless the parties have previously agreed, a term in the offer stipulating that silence shall amount to acceptance; article 10 (2) (*c*) on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer; and article 15 (2) on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time.

3. The principle is, however, broader than these examples and applies to every aspect of the formation of the contract.

Article 6. Usage

For the purposes of this Convention usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULIS, articles 9 (1) and 9 (2).

ULF, article 13 (1).

CISG, article 7.

Commentary

1. Article 6 is modeled on article 7 of CISG. However, it differs from CISG in one important respect.

2. Article 7 of CISG is a substantive provision which states that any "usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" is made applicable to the contract. In this Convention, however, a "usage" is made applicable to the transaction by virtue of articles 2 (2) and 4 (3). The function of article 6 is to define what constitutes a "usage" within the context of those articles of this Convention.

3. By virtue of a usage the parties may be found to have derogated from or varied the effect of one of the provisions of this Convention under article 2 (2). Similarly, article 4 (3) provides that the intent of a party or the understanding a reasonable person would have had in the same circumstances is to be found by taking into consideration any relevant usages.

Article 7. Communications

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

(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 12.

CISG, article 10.

Commentary

1. Article 7 provides that any indication of intention "reaches" the addressee when it is delivered to him, not when it is dispatched.

2. One consequence of this rule, as set out in articles 9 and 16, is that an offer, whether revocable or irrevocable, or an acceptance may be withdrawn if the withdrawal reaches the other party before or at the same time as the offer or the acceptance which is being withdrawn. Furthermore, an offeree who learns of an offer from a third person prior to the moment it reaches him may not accept the offer until it has reached him. Of course, a person authorized by the offeror to transmit the offer is not a third person in this context.

3. An offer, an acceptance or other indication of intention reaches the addressee when it is delivered to "his place of business or mailing address". In such a case it will have legal effect even though some time may pass before the addressee, if the addressee is an individual, or the person responsible, if the addressee is an organization, knows of it.

4. When the addressee does not have a place of

* The Working Group on the International Sale of Goods noted that article 5 had no equivalent in the draft Convention on the International Sale of Goods.

business or a mailing address, and only in such a situation, an indication of intention "reaches" the addressee on delivery to his habitual residence, i.e. his personal abode. As with an indication of intention delivered to the addressee's place of business or mailing address, it will produce its legal effect even though the addressee may not know of its delivery.

5. In addition the indication of intention "reaches" the addressee whenever it is made personally to him, whether orally or by any other means. There are no geographical limitations on the place at which personal delivery can be made. In fact such delivery is often made directly to the addressee at some place other than his place of business. Such delivery may take place at the place of business of the other party, at the addressee's hotel, or at any other place at which the addressee may be located.

6. Personal delivery to an addressee which has legal personality means personal delivery to an agent who has the requisite authority. The question as to who would be an authorized agent is left to the applicable national law.

Declaration of non-applicability, paragraph (2)

7. The declaration of non-applicability envisaged by paragraph (2) goes only to an indication of intention in any form other than in writing. However, even in a State which made such a declaration, article 7 (1) would have full effect in respect of any indication of intention which was in writing.

Chapter III. Formation of the contract

*Article 8. Offer**

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

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

(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 4.

ULIS, article 57.

CISG, article 37.

* Ghana and the Union of Soviet Socialist Republics expressed formal reservations to the second sentence of paragraph (3) of this article.

Commentary

1. Article 4 states the conditions that are necessary in order for a proposal to conclude a contract to constitute an offer.

Proposal sent to one or more specific persons

2. In order for a person to accept an offer, that offer must have been addressed to him. In the usual case, the requirement causes no difficulties since the offer to buy or sell goods will have been addressed to one specific person or, if the goods are to be bought or sold by two or more persons acting together, to those specific persons. The specifications of the addressee will usually be by name, but it could be made in some other way such as "the owner or owners of...".

3. It is also possible that an offer to buy or sell will be made simultaneously to a large number of specific persons. An advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specific persons", whereas the same advertisement of catalogue distributed to the public at large would not. If an advertisement or catalogue sent to "specific persons" indicated the intention to be bound to a contract in case of acceptance and if it was "sufficiently definite", it would constitute an offer under article 8 (1).

Proposal sent to other than one or more specific persons, paragraph (2)

4. Some legal systems restrict the concept of an offer to communications addressed to one or more specific persons while other legal systems also admit of the possibility of a "public offer". Public offers are of two types, those in which the display of goods in a store window, vending machine or the like are said to be a continuing offer to any person to buy that article or one identical to it, and advertisements directed to the public at large. In those legal systems which admit of the possibility of a public offer, the determination as to whether an offer in the legal sense has been made depends upon an evaluation of the total circumstances of the case, but does not necessarily require a specific indication of intention to make an offer. The fact that the goods are on display for sale or the wording of the advertisement may be enough for a court to determine that there was a legal offer.

5. This Convention, in article 8 (2), takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement such as "this advertisement constitutes an offer" but it must clearly indicate an intention to make an offer, for example, by a statement that, "these goods will be sold to the first person who presents cash or an appropriate banker's acceptance".

Intention to be bound, paragraph (1)

6. In order for the proposal for concluding a contract to constitute an offer, it must indicate "the intention of the offeror to be bound in case of acceptance".

Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labelled by the parties as an "offer" or as an "acceptance". Whether there is the requisite intention to be bound in case of acceptance will be established in accordance with the rules of interpretation contained in article 4.

7. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As for the revocability of offers, see article 10.

An offer must be sufficiently definite, paragraphs (1) and (3)

8. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. Paragraph (3) states that an offer is sufficiently definite if it:

Indicates the kind of goods, and

Fixes or makes provision for determining the quantity, and

Fixes or makes provision for determining the price.

The fact that the proposal for concluding a contract is sufficiently definite may be established by interpretation of the proposal in accordance with the rules of interpretation contained in article 4.

9. The remaining terms of the contract resulting from the acceptance of an offer which only indicates the kind of goods and fixes or makes provision for determining the quantity and the price would be supplied by usage or by the applicable law of sales. If, for example, the offer contained no term as to how or when the price was to be paid, CISG provides in article 39 (1) that the buyer must pay it at the seller's place of business and article 40 (1) provides that he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal. Similarly, if no delivery term is specified, article 15 of CISG provides how and where the goods are to be delivered and article 17 provides when they are to be delivered.

10. Nevertheless, the fact that a proposal contains only the three terms necessary for the offer to be sufficiently definite may indicate, in a given case, that there was no intention on the part of the offeror to be bound in case of acceptance. For example, it would be necessary to interpret the proposal to determine whether there was an intention to be bound in case of acceptance where a seller offered to sell equipment to be manufactured with the only specifications being the kind and quantity of the goods and a price of Swiss francs 10 million. It would normally be the case that a seller would not contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters suggests that there might have been as yet no intention to be bound to a contract in case of acceptance. However, even in the case of such a large and complicated sale, the applicable law of sales can supply all of the missing terms if the intention to contract is found to have existed.

Quantity of the goods, paragraph (3)

11. Although, according to article 8 (3), the proposal for concluding a contract will be sufficiently definite to constitute an offer if it fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

12. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

13. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the supply of the goods considered to be ancillary provisions. Article 8 (3) makes it clear that such a contract is enforceable even if it is denominated by the legal system as a contract of sale rather than as a concession agreement.

Price, paragraph (3)

14. The first sentence of article 8 (3) provides that the proposal for concluding a contract must fix or make provision for determining the price in order for it to constitute an offer. However, the second sentence indicates that this is not necessary if the "proposal indicates the intention to conclude the contract even without making provision for the determination of the price." In such a case, the last portion of the second sentence repeats the language of article 37 of CISG which provides the formula for determining the price.

15. It should be noted that the formula to be used if the second sentence of article 8 (3) applies would determine the price on the basis of that prevailing at the time of the conclusion of the contract, i.e. "at the moment the indication of assent reaches the offeror".[5] If at that moment there was no price generally charged by the seller or generally prevailing for such goods sold under comparable circumstances, the second sentence of article 8 (3) could have no effect and no legally effective offer would have been made.

16. The situation for which the price provision in

[5] Article 12 (2). The contract may, in certain circumstances, also be concluded by the performance of an act. See article 12 (3) and the commentary thereto.

article 8 (3) is primarily intended is that in which a buyer sends an order to buy goods from a catalogue or to buy spare parts. In such a case he may make no specification of the price at the time of placing the order. Even if the seller does not specify a price in his acceptance of the order, it was thought that a contract should be held to have been concluded and that, for example, the seller should not later be able to claim that the price was that prevailing at the time of delivery of the goods, where that price was higher than the one the seller was charging at the time of the conclusion of the contract.

Article 9. Time of effect of offer

The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable.

PRIOR UNIFORM LAW

ULF, article 5.

Commentary

Article 9 provides that an offer becomes effective when it reaches the offeree. Until this time the offeree may not accept the offer and the offeror may withdraw it, even if it is irrevocable. Therefore, if the offeree, having learned of the dispatch of the offer by some means, purported to accept the offer, the offeror could nevertheless withdraw it until it reached the offeree.

Article 10. Revocability of offer

(1) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

(2) However, an offer cannot be revoked:

(*a*) If the offer indicates that it is firm or irrevocable; or

(*b*) If the offer states a fixed period of time for acceptance; or

(*c*) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 5.

Commentary

Revocation of an offer, paragraph (1)

1. Article 10 states that offers are in general revocable and that the revocation is effective when it reaches[6] the offeree. However, the right of the offeror to revoke his offer terminates on the occurence of one of two events.

2. Under this Convention the less typical of the two events is that the offeree has made an effective acceptance and that the contract is, therefore, concluded. Such a result occurs in those cases in which the offeree orally accepts the offer and in those cases in which the offeree accepts the offer in conformity with article 12 (3).

3. Under article 12 (3) if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent without giving notice to the offeror by performing an act, such as one relating to the dispatch of the goods or payment of the price, the acceptance is effective at the moment the act is performed. Since the acceptance is effective and the contract is concluded at the moment the act is performed, the right of the offeror to revoke his offer terminates at that same moment. This result follows without having been set out specifically in this Convention.

4. In the more typical case in which the offer is accepted by a written indication of assent, article 10 (1) provides that the right of the offeror to revoke his offer terminates at the moment the offeree has dispatched his acceptance, and not at the moment the acceptance reaches the offeror. This rule was adopted even though article 12 (2) provides that it is at this later moment that the acceptance is effective and the contract is therefore concluded in accordance with article 17.

5. The value of a rule that a revocable offer becomes irrevocable prior to the moment at which the contract is concluded lies in the fact that it contributes to an effective compromise between the theory of general revocability of offers and the theory of general irrevocability of offers. Although all offers except those which fall within the scope of article 10 (2) are revocable, they become irrevocable once the offeree makes his commitment by dispatching the acceptance.

Irrevocable offers, paragraph (2)

6. Article 10 (2) sets forth three situations in which the irrevocability of the offer is a result of the nature of the offer.

7. Subparagraphs (*a*) and (*b*) are similar in that irrevocability arises out of the wording used in the offer. Subparagraph (*a*) governs the situation in which the offer indicates that it is firm or irrevocable. Subparagraph (*b*) governs the situation in which the offer states a fixed time for acceptance.

8. It should be noted that neither provision requires either a promise on the part of the offeror not to revoke or any promise, act or forbearance on the part of the offeree.

9. Both provisions reflect the judgement that in commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time. Therefore, if the offer indicates that the offer is firm or irrevocable for a certain period of time, the offer is irrevocable under this Convention for that period of time. If the offer states that it is firm or irrevocable without stating a period of time, it is irrevocable until the offer lapses under article 12 (2). If the offer states a fixed time for acceptance by a formula such as "you have until 1 June to accept this offer" or "if I have not received your acceptance by 1 June, I will send the goods to someone else", the offer is irrevocable until the end of the period for acceptance, i.e. until 1 June in these cases.

10. The third situation in which the offeror cannot

[6] Article 7 (1) contains a definition of the term "reaches".

revoke his offer under article 10 (2) is that it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

Article 11. Termination of offer by rejection

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

Commentary

1. Once the offeror has received a rejection of an offer, he should be free to contract with someone else without concern that the offeree will change his mind and attempt to accept the offer which he had previously rejected. Most, if not all, legal systems accept this solution in respect of revocable offers. Many legal systems also accept it in respect of irrevocable offers, but some legal systems hold that an irrevocable offer is not terminated by a rejection. Article 11 accepts the solution in respect of both revocable and irrevocable offers and provides that an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

2. An offer may be rejected either expressly or by implication. In particular, article 13 (1) provides that "a reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer". Although a tribunal may find that a given communication from the offeree to the offeror which contained inquiries about possible changes in the terms or which proposed different terms was an independent communication and, therefore, that it did not fall under article 13 (1), if the communication was found to contain additions, limitations or other modifications to the offer, the offer would be rejected and the offeree could no longer accept it.

3. Of course, the rejection of an offer by a reply which contains additions, limitations or other modifications of the offer does not make it impossible to conclude a contract. The reply would constitute a counter-offer which the original offeror might accept. If the additions, limitations or other modifications did not materially alter the terms of the offer, article 13 (2) provides that the reply would constitute an acceptance and the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the offeror rejected the proposed additions, limitations or other modifications, the parties could agree to contract on the terms of the original offer.

4. Therefore, in the context of a reply to an offer which constitutes an explicit or implicit rejection, the significance of article 11 is that the original offer terminates and any eventual contract must be concluded on the basis of a new offer and acceptance.

Article 12. Acceptance

(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down by the second and third sentences of paragraph 2 of this article.

(4) This article does not apply to the acceptance of an offer in so far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, articles 2 (2), 6 and 8.

Commentary

1. Article 12 sets out the conduct of the offeree which constitutes acceptance and the moment at which an acceptance is effective.

Acts constituting acceptance, paragraph (1)

2. Most acceptances are in the form of a declaration by the offeree indicating assent to an offer. However, article 12 (1) recognizes that other conduct by the offeree indicating assent to the offer may also constitute an acceptance.

3. In the scheme used in this Convention, any conduct indicating assent to an offer is an acceptance. However, subject to the special case governed by article 12 (3), article 12 (2) provides that the acceptance is effective only at the moment the indication of assent reaches the offeror.

4. Article 12 (1) also makes it clear that silence in itself does not amount to acceptance. However, if the silence is coupled with other factors which give sufficient assurance that the silence of the offeree is an indication of assent, the silence can constitute acceptance. For a further discussion of silence as acceptance, see paragraph 6 below and the commentary to article 2 (3).

Moment at which acceptance by declaration is effective, paragraph (2)

5. Article 12 (2) provides that an acceptance is effective only at the moment a notice of that acceptance reaches the offeror. Therefore, no matter what is the form of the acceptance under article 12 (1), a notice of that acceptance must in some manner reach the offeror in order to bring about the legal consequences associated with the acceptance of an offer.

6. There are two exceptions to this rule. The first exception is mentioned in the opening words of article 12 (2) which state that the rule is subject to article 12 (3). Under article 12 (3), in certain limited circumstances, it is possible for an offer to be accepted by the performance of an act without the necessity of a notice. The other exception follows from the general rule in article 2 (2) that the parties may agree to derogate from or vary the effect of any provision of this Convention. In particular, if they have agreed that the silence of the offeree will constitute acceptance of the offer, they have by implication also agreed that no notice of that acceptance is required.[7]

7. It is not necessary that the indication of assent required by article 12 (2) be sent by the offeree. A third party, such as a carrier or a bank, may be authorized to give to the offeror the notice of the conduct which constitutes acceptance. It is also not necessary for the notice to state explicitly that it is notice of acceptance, so long as it is clear from the circumstances surrounding the notice that the conduct of the offeree was such as to manifest his intention to accept.

8. Article 12 (2) adopts the receipt theory of acceptance. The indication of assent is effective when it reaches the offeror, not when it is dispatched as is the rule in some legal systems.

9. Article 12 (2) states the traditional rule that an acceptance is effective only if it reaches the offeror within the time fixed or, if no such time was fixed, within a reasonable time. However, article 15 provides that an acceptance which arrives late is, or may be, considered to have reached the offeror in due time. Nevertheless, the sender-offeree still bears the risk of non-arrival of the acceptance.

Acceptance of an offer by an act, paragraph (3)

10. Article 12 (3) governs the limited but important situation in which the offer, the practices which the parties have established between themselves or usage permit the offeree to indicate assent by performing an act without notice to the offeror. In such a case the acceptance is effective at the moment the act is performed.

11. An offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay...".

12. The act by which the offeree can accept in such a case is that act authorized by the offer, established practice or usage. In most cases it would by the shipment of the goods or the payment of the price but it could be any other act, such as the commencement of production, packing the goods, opening of a letter of credit or, as in the second example in paragraph 11 above, the procurement of the goods for the offeror.

13. It should be noted that an offer which permits the offeree to accept by performing an act without notice to the offeror does not constitute a unilateral derogation from the general rule of article 12 (2) that an acceptance is effective only upon notice to the offeror. Since article 12 (3) specifically anticipates the possibility that the offer will authorize acceptance in this manner, it is not necessary that there be a prior agreement between the parties to this effect.

Declaration of non-applicability, paragraph (4)

14. The declaration of non-applicability envisaged by paragraph (4) applies only to acceptance in any form other than in writing. In effect such a declaration would exclude the cases envisaged by article 12 (3) and would limit the operation of article 12 (1) to declarations of assent made in writing. The declaration of non-applicability would also exclude acceptance by silence.

Article 13. Additions or modifications to the offer

(1) A reply to an offer containing 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 which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 7.

Commentary

General rule, paragraph (1)

1. Article 13 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.

3. However, the acceptance need not use the exact same words as used in the offer so long as the differences in the wording used in the acceptance would not change the obligations of the parties.

4. Even if the reply makes inquiries or suggests the possibility of additional terms, it may be that it does not fall under article 13 (1). The reply may be considered as

[7] No specific rule is given as to when acceptance by silence is effective. See, however, example 2C in which it is concluded that the acceptance was effective at the expiration of the relevant period of time. In at least one legal system the effect of silence is related back to the time when the offer is received by the offeree. Swiss Code of Obligations, art. 10, subs. 2.

an independent communication intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

5. This point is of special importance in the light of article 11 which provides that "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror".

6. Although the explanation for the rule in article 13 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 13 (1), does not give desirable results. Article 13 (2) creates an exception to article 13 (1) in regard to one of these situations.

Non-material alterations, paragraph (2)

7. Article 13 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which do not materially alter the terms of the offer. For example, an offer stating that the offeror has 50 tractors available for sale at a certain price is accepted by a telegram which adds "ship immediately" or "ship draft against bill of lading inspection allowed".

8. In most cases in which a reply purports to be an acceptance any additional or different terms in the reply will not be material and, therefore, under article 13 (2) a contract will be concluded on the basis of the terms in the offer as modified by the terms in the acceptance. If the offeror objects to the terms in the purported acceptance, the reply does not function as an acceptance but falls under article 13 (1). Therefore, if the offeror objects to a reply which adds "ship immediately" on the grounds that, where no delivery date is specified, the seller must deliver the goods "within a reasonable time after the conclusion of the contract",[8] the reply is a rejection of the offer.

9. In the normal course of events in which the offeror objects to a non-material addition or limitation, the two parties will agree on mutually satisfactory terms without difficulty. However, since the offer was rejected by the addition of the non-material alteration to which the offeror objected, the offeree may no longer accept the original offer.

10. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to this reply by shipping the goods or paying the price, a contract may eventually be formed by notice to the original offeree of the shipment or payment. In such a case the terms of the contract would be those of the counter-offer.

Article 14. Time fixed for acceptance

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 8 (2).

UNCITRAL Arbitration Rules, article 2 (2).

1. Article 14 (1) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

2. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 14 (1) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the moment the telegram is handed in for dispatch".

3. In the case of a letter the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope". This order of preference was chosen for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controlled, the offeror could not know the termination date of the period during which the offer could be accepted.

Article 15. Late acceptance

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 9.

Commentary

1. Article 15 deals with acceptances that arrive after the expiration of the time for acceptance.

[8] CISG, article 17 (*c*).

Power of offeror to consider acceptance as having arrived in due time, paragraph (1)

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 15 (1) provides that the late acceptance becomes an effective acceptance if the offeror without delay informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to be effective.

3. Article 15 (1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance at the moment the original offeror informs the original offeree of his intention either orally or by the dispatch of a notice whereas under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

Acceptances which are late because of a delay in transmission, paragraph (2)

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that, if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment the acceptance reaches the offeror, unless the offeror without delay notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time, the offeror must notify the offeree to prevent a contract from being concluded. If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must notify the offeree that he considers the acceptance to be effective.

Article 16. Withdrawal of acceptance

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 10.

Commentary

Article 16 provides that an acceptance cannot be withdrawn after it has become effective. This provision complements the rule in article 17 that a contract of sale is concluded at the moment the acceptance becomes effective.[9]

[9] Articles 12 (2) and 12 (3) state when an acceptance becomes effective.

Article 17. Time of conclusion of contract

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

Commentary

1. Article 17 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention and CISG which depend on the time of the conclusion of the contract.

2. On the other hand article 17 does not state an express rule for the place at which the contract is concluded. Such a provision is unnecessary since no provision of this Convention or of CISG depend upon the place at which the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. However, the fact that article 17, in conjunction with article 12, fixes the moment at which the contract is concluded may be interpreted in some legal systems to be determinative of the place at which it is concluded.

Article 18. Modification and rescission of contract

(1) The contract may be modified or rescinded by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. 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.

(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and rescission of a contract.

General rule, paragraph (1)

2. Paragraph (1), which states the general rule that a contract may be modified or rescinded merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the com-

mon law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because "consideration" is lacking.

3. Many of the modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 18 (1) are effective, thereby overcoming the common law rule that "consideration" is required.

4. In addition, article 18 (1) is applicable to the question as to whether the terms in a confirmation form or in an invoice sent by one party to the other after the conclusion of the contract modify the contract where those terms are additional or different from the terms of the contract as it was concluded. If it is found that the parties have agreed to the additional or different terms, article 18 (1) provides that they become part of the contract. As to whether the silence on the part of the recipient amounts to an agreement to the modification of the contract, see articles 2 (2) and 12 (1) and the commentaries to those articles.

5. A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 13.

Modification or rescission of a written contract, paragraph (2)

6. Although article 3 of this Convention and article 11 of CISG provide that a contract need not be in writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or rescission unless in writing, can be modified or rescinded orally.

7. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 3 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 18 (2) provides that a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

8. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, article 18 (2) goes on to state that to the extent the other party has relied on such conduct, the first party cannot assert the provision.

9. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or rescission to be in writing is precluded from doing so only to the extent that the other party has relied on the conduct of the first party. This may mean in a given case that the terms of the original contract may be reinstated once the first party denies the validity of the non-written modification.

Example 18A: A written contract for the sale to A over a two-year period of time of goods to be manufactured by B provided that all modifications or rescissions of the contract had to be in writing. Soon after B delivered the first shipment of goods to A, A's contracting officer told B to make a slight modification in the design of the goods. If this modification was not made, he would instruct his personnel to reject future shipments and not to pay for them. Even though B did not receive written confirmation of these instructions, he did modify the design as requested. The next five monthly deliveries were accepted by A but the sixth was rejected as not conforming to the written contract. In this case A must accept all goods manufactured according to the modified design but B must reinstate the original design for the remainder of the contract.

Declaration of non-applicability, paragraph (3)

10. For the effect of paragraph (3), see the commentary to article (X).

Article (X). Declarations

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the contract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

CISG, article (X).

Commentary

1. This convention gives effect to an offer, the acceptance of an offer or the modification or rescission of a contract made orally or evidenced by conduct or even, in certain cases, by silence. These rules are similar to those in force in the majority of legal systems.

2. However, in some legal systems the requirement of a writing for the conclusion, modification or rescission of a contract is considered to be of vital importance. Therefore, article (X) permits a Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing to make a declaration to the effect that those provisions of this convention which allow the conclusion, modification or rescission of the contract other than in writing do not apply if one of the parties has his place of business in the declarant State.

3. Article (X) is supplemented by a separate paragraph in the affected articles, i.e. articles 3, 7, 12 and 18. This separate paragraph specifies the effect which the declaration made under article (X) would have on the application of that article. The last sentence of each of these separate paragraphs makes it clear that

the individual parties to the transaction may not by their private agreement under article 2 (2) derogate from the effect of such a declaration.

4. A declaration under article (X) does not reverse the rule in the affected articles and create a requirement under this convention that the contract be concluded, modified or rescinded in or evidenced by writing. Instead, it has the effect of eliminating from this convention any rule on the requirement of a written form, leaving the determination of the issue to the applicable national law as determined by the rules of private international law of the forum.

E. Report of the Secretary-General: incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods (A/CN.9/145)*

I. Introduction

1. At its tenth session the United Nations Commission on International Trade Law deferred until its eleventh session the question whether the rules on formation and validity of contracts for the international sale of goods should be the subject-matter of a convention separate from the Convention on the International Sale of Goods.[1] Subsequently, at its ninth session the Commission's Working Group on the International Sale of Goods completed its work on the preparation of rules on the formation and validity of contracts. The Working Group noted that it had prepared those rules in the form of a separate convention. Therefore, in order to assist the Commission in its decision, the Working Group requested the Secretariat to make a study of the drafting problems which the incorporation of the rules on formation and validity of contracts into the draft Convention on the International Sale of Goods would entail.[2] This report is submitted in response to that request.

2. Part II of this report examines drafting problems that would arise from an integration of the specific rules of each draft Convention.

3. Part III of this report contains draft final clauses which would enable a State to ratify the provisions on formation, the provisions on sale or both.

4. Part IV contains a suggested lay-out of the composite text including, when appropriate, amended titles.

5. This report shows that there are no insuperable technical problems to combining the texts into a single Convention if the Commission should wish to make such a decision.

II. Drafting problems in relation to integration of substantive rules

6. The lay-out for a compositive Convention, which is suggested in Part IV of this Convention, would have seven chapters as follows:

Chapter I.	Sphere of application
Chapter II.	General provisions
Chapter III.	Formation of contracts
Chapter IV.	Obligations of the seller
Chapter V.	Obligations of the buyer
Chapter VI.	Provisions common to the obligations of the seller and of the buyer
Chapter VII.	Passing of the risk

7. In respect of each provision discussed in the report a suggestion will be made as to whether it should be placed in the chapter on sphere of application (chap. I), the chapter on general provisions (chap. II) or in one of the chapters relevant only to formation of the contract (chap. III) or only to sales (chaps. IV to VII). At paragraph 70 there is a chart showing the suggested arrangement of all the articles of the composite Convention.

Rules on scope of application

8. The rules on scope of application of the draft conventions are contained in article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods (cited as Formation)[3] and in articles 1, 2, 3, 5 and 6 of the draft Convention on the International Sale of Goods (cited as CISG).[4]

Formation article 1 (1); CISG article 1 (1)

9. The differences between the two texts are as follows:

Formation	*CISG*
"to the formation of contracts"	"to contracts"
"between parties"	"entered into by parties"

10. The rule in both texts is the same. The two texts could be combined as follows:

"This Convention applies to the formation of contracts of sale of goods between parties, and to contracts of sale of goods entered into by parties, whose places of business are in different States:

"(*a*) . . .

"(*b*) . . ."

Formation article 1 (1); CISG article 1 (1)

11. If the Commission should decide to adopt the suggestion made in paragraph 67 of this report that a State, if it so chose, should be able to ratify only the rules on formation of contracts or only the rules on contracts of sale, a means would have to be devised to

* 29 March 1978.

[1] *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 33 (Yearbook . . . 1977, part one, II, A).

[2] 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.9/142, para. 303 (reproduced in the present volume, part two, I, A).

[3] The text of the draft Convention as approved by the Working Group on the International Sale of Goods at its ninth session is found in A/CN.9/142/Add.1 (reproduced in the present volume, part two, I, A, annex).

[4] The text of the draft Convention as approved by the Commission at its tenth session is found in A/32/17, para. 35 (Yearbook . . . 1977, part one, II, A).