

innovation for common law systems is the elimination of the traditional distinction between conditions and warranties in respect of the seller's obligation to deliver conforming goods (article 35). These innovations in regard to the common law represent the acceptance of concepts that are well known in civil law countries. There are, of course, many concepts in the Convention taken from the common law that are innovations to the civil law. This balancing of ideas from different legal systems represents both an effort to effect compromises that would make the Convention acceptable to all States and an effort to choose from the competing legal rules those that seemed advantageous for international sales transactions.

1.20 There are also a number of solutions that represent an authentic innovation of the uniform law insofar as they are as such virtually unknown to most, if not all, traditional sales laws. These include the unified approach to the parties' obligations and, correspondingly, to the remedies for breach of contract (articles 30 and 53, 45 and 61); the sellers right to cure defects in his or her performance not only up to the date for delivery, but even thereafter, provided that he can do so without causing the buyer unreasonable inconvenience (articles 34, 37 and 48); the limitation of the right to avoid the contract to breaches that are fundamental (articles 25, 49(1)(a), 64(1)(a) and 73), except in the case of non-delivery, non-payment or failure to take delivery, where avoidance becomes possible also if the defaulting party does not perform within an additional period of time of reasonable length fixed by the aggrieved party (articles 49(1)(b) and 64(1)(b)); and separation of the passing of risk for loss of or damage to the goods from the passing of property and relating it to the physical acts of transfer of possession of the goods to a carrier or to the buyer (articles 85-88).

4. SPHERE OF APPLICATION OF THE CONVENTION

(a) Scope

1.21 As article 1 indicates, the Convention applies to contracts of sale of goods. There is no definition of a sale, but the statements of the obligations of seller (article 30) and buyers (article 53) imply a conventional definition. A contract of sale is first and foremost a contract, i.e. a consensual transaction based on an agreement to buy and an agreement to sell. A contract of sale of goods must be distinguished from several other transactions that are normally quite different from a sale of goods but that, in particular circumstances, may closely resemble such a contract, namely

- (1) a contract of exchange,
- (2) a gift,
- (3) a contract of bailment,
- (4) a contract of hire-purchase,
- (5) a contract of loan on the security of goods,
- (6) a contract of agency and
- (7) a contract for the supply of services.

In its article 3 the Convention deals specifically only with distinction between a contract of sale and a contract for services, leaving the other distinctions to the otherwise applicable local law. A contract in which one party undertakes to supply goods to be manufactured or produced is a sale (article 3(1) unless the other party supplies a substantial part of the material involved in the manufacturing or production. A contract in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services is not a sale (article 3(2)). This leaves scope for interpretation, particularly in the case of large, complex transactions, such as turn-key contracts. Of course, just as the parties may contract out of the Convention, they may agree that it shall apply to a transaction to which it is, or may be, otherwise inapplicable. As regards the meaning of "goods" certain items are excluded from the applicability of the Convention as is shown later.

(b) Applicability of the Convention to international contracts of sale of goods

1.22 The Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States, or
- (b) when the rules of private international law lead to the application of the law of a Contracting State (article 1(1)(a) and (b)).

If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the contract and its performance (article 10(a)). The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract (article 1(2)). It should be noted that for the Convention to apply it is sufficient that the parties' places of business are located in different States. It is not as such relevant whether the formation and the execution of the contract take place in the same State or in different States.

1.23 The Convention applies also when one party or both parties have their places of business in a State which is not a Contracting State if the conflict of laws rules lead to the application of the law of a Contracting State (article 1(1)(b)). If the conflict rules of the forum provide that the law applicable to the contract is that of a contracting State, article 1(1)(b) provides that the law to be applied is the Convention and not the law applicable to domestic sales of goods. Usually a contract is governed by the law chosen by the parties. If the parties choose the law of a Contracting State, the Convention applies automatically to the contract despite the fact that one party or both parties do not have their places of business within a Contracting State. Article 95 permits a State, at the time it becomes a party, to declare it will not be bound by article 1(1)(b), in which case the Convention applies only if both buyer and seller are from contracting States.

1.24 The Convention applies to contracts of sale of goods within its sphere of application unless the parties exclude its application in whole or in part (article 6). This upholds the basic principle of contractual freedom by allowing parties to exclude the application of the Convention or derogate from or vary the effect of any of its provisions. Aside from complete exclusion of the Convention, normally by choosing the law of a non-contracting State or by specifying the domestic law of sales of a contracting State, the most frequent application of article 6 will occur when a provision of the contract covers the same issue as does the Convention but provides a different solution. A provision of little importance to Commonwealth Countries is that the Convention applies irrespective of the civil or commercial character of the parties or the contract (article 1(3))¹⁴.

(c) Excluded matters

1. Validity and passing of property

1.25 The Convention covers only the relationship between the buyer and the seller. It does not regulate the rights of third parties. It does not cover the passing of property (transfer of ownership) and consequently is not concerned with the rights of a third party who acquires the property or of creditors of a buyer or seller in the event of bankruptcy. All these matters are left to be governed by otherwise applicable local law. The passing of property was excluded because of the difficulty of reconciling national differences and, more especially, because the subject boils over into other areas outside the law of contract. The Convention does, however regulate, as between the parties, a number of related matters, such as the seller's obligation to deliver goods free of third party claims and the passing of risk, as is discussed later.

1.26 The Convention does not cover the validity of the contract or of any of its provisions (article/4(a). Matters which are thus outside the scope of the Convention include:

- (a) capacity of the parties,
- (b) rules concerning contracts contra bonos mores,
- (c) rules regarding contracts against public policy,
- (d) legislation intended to protect the weaker party and
- (e) questions of fraud, duress, and mistake.

Also excluded are administrative law matters such as

- (a) exchange control legislation,
- (b) price control legislation, and

14 This rule is particularly necessary for those countries that apply commercial law rules to parties characterised as commercial parties and different rules to other parties. To some extent the non-application of the Convention to consumer sales achieves the same purpose.

- (c) legislation requiring export licences for certain goods.

Validity was excluded for several reasons. Questions of illegality and capacity belong fairly obviously to domestic law. Questions of mistake, fraud, unconscionability etc. presented other difficulties. There are wide differences of approach between national systems and especially between common law and civil law, and even if agreement could have been reached on a form of words, interpretations by national courts would almost certainly have destroyed the apparent unity.

2. Products liability

1.27 The Convention in addition does not govern product liability. Article 5 provides that the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. This exclusion is important for those systems, such as French law, which excludes recourse to tort remedies between parties in a contractual relationship. In such systems the contractual remedy provides greater protection in case of personal injury than is accorded by the Convention, which is drafted with commercial damage in mind.

3. Consumer contracts, auctions, stocks and securities excepted

1.28 The United Nations Sales Convention excludes certain types of sales from its ambit (article 2). It excludes consumer sales, defined as sales 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 (article 2(a)). This is because in a number of countries consumer sales are subject to various types of national laws that are designed to protect consumers. Their exclusion avoids any risk of impairing the effectiveness of such national laws. Sales on execution or otherwise by authority of law are excluded as are sales of stocks, shares, investment securities, negotiable instruments or money, sales of ships, aircraft or vessels and sales of electricity (article 2(c), (d), (e) and (f)). The reason for the exclusion of this group of contracts is that sales of these kinds are usually subject to special national rules.

5. GENERAL PROVISIONS OF SPECIAL IMPORTANCE

(a) Interpretation and gap-filling

1.29 In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade (article 7(1)). Although good faith may be considered to be a vague concept capable of a wide variety of interpretations, the good faith principle can serve a number of useful purposes. It gives the courts the flexibility that is needed by any law to make it work in practice. This flexibility will allow tribunals to avoid overly literal interpretations of