

- (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

the Convention that would provide inequitable results unintended by the drafters and could prevent an all too hasty resort to domestic law. Furthermore, the obligation of good faith itself may foster an atmosphere of mutual trust among businessmen.

1.30 Questions not expressly settled by the Convention are to be settled, in the first instance, in conformity with the general principles on which the Convention is based (article 7(2)). But in article 7(2) it adds that in the absence of such principles, such questions are to be settled "in conformity with the law applicable by virtue of the rules of private international law." Thus courts are to make reference to one or more systems of national law to fill in gaps in the Convention. Further, the Convention contains a provision on the interpretation of statements and other conduct of a party, which will be relevant for the interpretation of the contract as distinct from interpretation of the Convention (article 8(1) and (2)).

(b) Usage

1.31 Article 9(1) of the United Nations Sales Convention states that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. By practices which the parties have established between themselves is meant a course of dealing adopted by the individual parties unless that course of dealing has been excluded for a specific contract or for their relations in general for the future. Courses of dealing are automatically applicable not only to supplement the terms of the contractual agreement but also, pursuant to article 8(3) to help to determine the parties' intent. In most cases a course of dealing will relate to a minor point, such as a certain tolerance for non-observance of statutory or contractual time requirements or for quantitative or qualitative defects of the delivered goods, the granting of a price reduction, or notice procedures. However, a course of dealing could sometimes affect the entire content of the contract. For example, if the parties in their previous transactions regularly adopted certain general conditions contained in a separate writing, in subsequent contracts they may be bound by those conditions even in the absence of any express reference to them.

1.32 An agreement to apply a usage may be implied. That would be the case where the parties with respect to particular issues related to the formation or the performance of the contract deliberately acted in conformity with a local usage or a usage within a given trade. An implied reference to a usage may also be contained in an express statement of one party, provided that the interpretation of the statement permits such an inference. According to article 8(1) the decisive factor in this respect is the actual intent of the party making the statement, provided that the other party knew or could not have been unaware of that intent. Otherwise the understanding which a reasonable person of the same kind as the other party would have had in the same circumstances is to be considered (article 8(2)).

1.33 In addition to usages to which the parties may have agreed, according to article 9(2) they are considered, unless otherwise agreed, to have impliedly made applicable to their contract

usages of which they knew or ought to have known and which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. The first requirement is intended to ensure that there will always be an effective link between the application of a particular usage and the parties' intention. The second requirement is an objective one. Its purpose is to avoid that usages, that may now have been confined to domestic sales, will be applied to transactions with foreign traders.

6. FORMATION OF CONTRACT

(a) Form

1.34 This was from the very beginning one of the most difficult and controversial issues. Some State trading countries wished to protect their own rule, which they regarded as vital to the functioning of their foreign trade agreements, that all international trade contracts had to be in writing. That position was, however, unacceptable to most other States. Therefore article 11 states that a sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. This means that any such requirement prescribed by the domestic law of the contracting State does not apply to contracts subject to the Convention irrespective of the nature of the requirement and of the purposes it is supposed to serve. A contract of sale may be proved by any means, including witnesses.

1.35 However, the Convention in article 96 allows a contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing to make a declaration at any time that any provision of article 11, article 29 or Part II of the Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State¹⁵. Of course, it does not automatically follow that the formal requirements of the declaring State will apply. That will be so only if, under the relevant rules of private international law, the law applicable to the formation of the contract is that of the declaring State. On the other hand the principle of freedom of form does not prevent the parties from agreeing to a writing requirement. This follows from the basic principle of party autonomy, which applies

15 Article 96 was included as laws of a few countries impose strict formal requirements for the making of foreign trade contracts. See J Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, p.129 (1982). It is not expected that many countries will take advantage of article 96. Of the 29 States that had become party to the Convention as of 22 August 1990, only Argentina, Chile, China, Byelorussian S.S.R., Hungary, Ukrainian S.S.R. and the U.S.S.R. had made the declaration under article 96.