

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.

as well to the prerequisites for the existence or termination of the obligation and is also reaffirmed in article 29(2). This latter article further makes it clear that a formal writing requirement agreed upon by the parties can be changed or suspended only by a written agreement.

(b) Offer and revocation of an offer

1.36 Article 14(1) of the United Nations Sales Convention defines an offer as a proposal for concluding a contract addressed to one or more specific persons, provided that it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. Article 14(1) is intended to be specific about what constitutes an offer. All the requirements must be present in a proposal for concluding a contract. Other stipulations may also be contained in the proposal. For instance, a proposal purporting to be an offer may also include a clause to the effect that the offer is conditional, depending on whether a future event ensues. Under the Convention a proposal is sufficiently definitive if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. Consequently, indications of the goods to be bought or sold, and the quantity and price thereof seem to be essential under this article. However, in most jurisdictions if a party insists on an agreement concerning further issues such as the modalities of delivery of payment, such issues also become essential. As such demands emanate from party autonomy they must be respected.

1.37 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. The term specific person includes individual legal persons, partnerships and joint ventures carrying out a business in common and capable of suing or being sued in the name of the partnership. In such cases all partners act as each other's agents. Consequently, the offer may be addressed to all or several partners as well as to one of them, since one partner binds all others. What is relevant here is not necessarily the name of the addressee, but it must be clear from the words used which specific person or persons is or are addressed. The number of addressees of an offer is immaterial. Proposals to buy or sell sent in the mail directly to the addressee meets the requirement of specific persons even if thousands of such proposals have been mailed to specific addressees.

1.38 The Convention makes a distinction between withdrawing and revoking an offer. Withdrawal occurs before the offer is effective, revocation afterwards. Withdrawal is effective if it reaches the offeree before or at the same time as the offer (article 15(2)). Revocation is effective if it reaches the offeree before he has dispatched an acceptance (article 16(1)). Article 16(2) deals with the more problematic question of the irrevocable offer. Here different systems give divergent answers. If the offer is expressly stated to be irrevocable, many Commonwealth jurisdictions will require consideration to support a promise not to revoke the offer, whereas civil law systems will normally find an enforceable undertaking not to revoke. Difficulties arise when there is no express undertaking, but, for

example, a fixed time is stated by which the offer must be accepted. In many Commonwealth jurisdictions this will constitute no more than an indication that after that time the offer will lapse unless previously revoked¹⁶. In civil law systems, however such a statement is in general regarded as indicating that the offer is irrevocable for the period stated. If no such period is stated, an offer is taken to be irrevocable for a reasonable time. The position of the Convention is a compromise. The Convention accepts the general principle that an offer may be revoked at any time (article 16(1)), but makes an offer irrevocable in certain cases (article 16(2)). It cannot be revoked if it indicates, by stating a fixed time for acceptance or otherwise, that it is irrevocable or if it was reasonable for the offeree to rely on its being irrevocable and he has acted in reliance on it. An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror (article 17). Thus if the offer is stated to be open for a specified 10 days, the offeror is free to deal elsewhere if he receives a rejection after 3 days.

(c) Acceptance

1.39 An acceptance is defined in the Convention as a statement made by, or other conduct of, the offeree which indicates assent to an offer. The Convention states that as a general rule silence shall not in itself amount to acceptance (article 18(1)). Silence may amount to acceptance, if it is coupled with other factors giving sufficient assurance of the offeree's intention. For instance, the Convention recognizes that as a result of the offer or practices established between the parties or usage, an offer might be accepted by the offeree performing an act, such as the dispatch of goods or the payment of the price (article 18(3)). The Convention applies the basic rule that an acceptance is effective only when it is communicated. Contrary to the predominant view in common law jurisdictions¹⁷ the Convention allows withdrawal of the acceptance up to the moment when the acceptance reaches the offeror (article 22 and 18(2)). On the question of who bears the risk that an acceptance will be lost or delayed in its transmission to the offeror, the common law rule would be that it passes to the offeror on dispatch of the acceptance. However, the Convention applies the general rule that an acceptance is effective on receipt. It is therefore up to the offeree to make enquiry if he receives no response to his acceptance, whereas under the common law the burden is on the offeror to enquire if he receives no acceptance. An oral offer

16 See M.P. Furmston, *Cheshire and Fifoot's Law of Contract*, 10th edition, London, Butterworths, 1981, p.50 and also *Payne v Care* (1789) 3 Term Rep. 148.

17 At common Law the contract is complete from the moment the letter accepting the offer has been put in the post. See *Adams v Lindsell* 91/L/Q/R.247; *Howell Securities Ltd. v Hughes* [1974] 1 All.E.R.161 and *Byne v Van Tienhoven* (1880) 5 CPD 344. A warning against the assumption that the rule will always be applied was given in the Australian case of *Tallerman v Nathan's Merchandise Ltd.* (1957) 98 C.L.R. 93.

must be accepted immediately unless the circumstances indicate otherwise. Where acceptance takes the form of an act, the act must be performed within the same time limits as if the acceptance had been made by communication (article 18(3)). The Convention however, provides that the acceptance is effective at the moment the act is performed (article 18(3)).

1.40 The period during which the offeree can accept runs in the absence of an indication to the contrary from the day the offeror's letter was dated. The date of the letter is the date shown on it; if no date is shown, it is the date on the envelope (article 20(1)). In the case of an offer made by instantaneous means of communications (e.g. telephone or telex), the time period runs from the moment the offer reaches the offeree (article 20(1)). It is further provided in article 20(2) that if notice of acceptance cannot be delivered to the offeror because the last day of the time period is an official holiday or non-business day, the period is extended to the first business day following. Article 21(1) of the Convention has the effect that a late acceptance is not effective unless, without delay, the offeror so informs the offeree. Article 21(2) deals with an acceptance which, though sent in an appropriate time, is received late because of a delay in transmission. In this case, the acceptance, even though it is late, is considered to be effective unless the offeror otherwise informs the offeree without delay. The burden is on the offeror to inform the offeree without delay that he considers his offer to have lapsed prior to the receipt of the acceptance. To this extent the risk is shifted to the offeror. The question does not, of course, arise in common law, where the acceptance would have been effective from the moment of dispatch¹⁸.

1.41 The general rule in article 19(1) of the Convention is that an offeree must accept the offer as it stands: if he attempts to add or subtract anything from it, he is not accepting it but making a counter offer. In article 19(2) of the Convention this general rule is qualified in that a reply which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror, without undue delay, objects to the discrepancy. The Convention, in article 19(3) gives examples of some of the types of changes that would amount to materially altering the terms of an offer. It states that additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. Since article 19(2) is confined to such differences as do not "materially alter" the terms of the offer, its effect is likely to be no more than to put on the offeror the burden of objecting "without undue delay" to merely verbal differences between the offer and reply. An attempt to enlarge the scope of the paragraph by a restrictive interpretation of what constitutes a material alteration would run counter to

18 Adams v Lindsell, (1818), 1 B & Ald. 681 and Bruner v Moore, [1904] 1 CH. 305.

paragraph 3, which is so widely drafted as to include most alterations about which there could be any difference of opinion. Since even within domestic systems any solution to the problem is controversial, it was not to be expected that an international body, dealing with diverse legal systems, would be able to resolve the problem in a radical manner.

7. RIGHTS AND DUTIES OF THE BUYER AND SELLER

(a) Obligations of the seller

(1) Delivery of goods and handing over of documents

1.42 The general obligations of the seller are summed up in article 30 of the Convention. This provision contains detailed treatment of the seller's obligations in respect of delivery of the goods and their conformity with the contract. The seller must deliver the goods, hand over any documents relating to the goods and transfer the property in the goods. The seller is required to deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim (article 41). The goods must also be free from any right or claim of a third party based on industrial property or other intellectual property of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

- (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State, or
- (b) in any other case, under the law of the State where the buyer has his place of business (article 42(1)(a) and (b)). The obligation of the seller does not extend to cases where at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim or where the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer (article 42(2)(a) and (b)).

(2) Conformity of the goods

1.43 Article 35 of the Convention requires the seller to deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they

- (a) are fit for the purpose for which goods of the same description would ordinarily be used;