

CHAPTER II

Accession Procedure

(a) Depository

2.01 The Convention is subject to ratification, acceptance or approval by the signatory States (article 91(2)) and it is open for accession by all States that are not signatory States (article 91(3)). Accession, ratification, acceptance, approval may be effected by an instrument to that effect being deposited with the Secretary-General of the United Nations (article 91(4)). The Convention entered into force on the 1st January 1988, which was the first day of the month following the expiration of twelve months after the deposit of the tenth instrument of ratification, acceptance, approval or accession in accordance with article 99(1). The Convention takes effect with respect to a newly adhering State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession (article 99(2)). This is subject to the proviso that ratifications, acceptances, approvals and accessions in respect of the Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention are not effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective (article 99(6)).

2.02 A State which becomes party to the Convention and is a party to either or both the Conventions relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods (1964 Hague Sales Convention) is required to denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect. Among the States that have become party to the Convention Italy and Germany were party to both of the Hague Uniform Laws and have denounced them. Among Commonwealth States only the Gambia and the United Kingdom are party to the two 1964 Hague Conventions and are, therefore, subject to the provisions of article 91.

(b) Reservations

2.03 Under the Convention no reservations are permitted except those expressly authorized in the Convention (article 98). Article 98 excludes any ambiguity which might otherwise exist in the light of article 19 of the United Nations Convention on the Law of Treaties, which permits the formation of reservations unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or

- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 98 brings the Convention squarely within the ambit of article 19(b) of the United Nations Convention on the Law of Treaties and thus avoids the possibility of States making further reservations of the kind contemplated by article 19(c) which are not incompatible with the object and purpose of the treaty. Any such purported reservation by a contracting State to the United Nations Sales Convention would be ineffective.

(c) Authorised declarations

2.04 A contracting State may declare at the time of becoming party to the Convention that it will not be bound by Part II (relating to the formation of the contract) of the Convention or that it will not be bound by Part III (relating to the parties' obligations and remedies for breach of contract) of the Convention (article 92(1)). A contracting State which makes a declaration in accordance with article 92(1) in respect of Part II or Part III of the Convention is not to be considered a contracting State within paragraph (1) of article 1 of the Convention in respect of matters governed by the part to which the declaration applies. The purpose of article 92 is to enable States which may wish to become parties to the United Nations Sales Convention, but which might prefer not to accept part II of the Convention; Formation of the Contract or Part III, Sale of Goods, to do so. Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (formation of the contract). For Commonwealth countries there would be no advantage in limiting the scope of the Convention by making such a declaration.

2.05 The Convention in article 93 permits a contracting State, at the time of becoming party to the Convention to declare that the Convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration any time. It should, however, be noted that for a State to make the declaration under article 93 it is necessary not only for it to have two or more territorial units but that, according to its constitution, different systems of law are applicable in those units in relation to the matters dealt with in the Convention. The provision permits federal States on one hand to apply the Convention progressively to their territorial units and on the other hand to permit those States which wish to do so to extend its application to all their territorial units from the very outset. The same option is given to a State such as the United Kingdom which, while not a federal State, has different systems of law applicable in Scotland and in the rest of the country.

2.06 Two or more contracting States which have the same or closely related rules on matters governed by the Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations (article

94(1)). A contracting State which has the same or closely related legal rules on matters governed by the Convention as one or more non-contracting States may at any time declare that the Convention is not to apply to Contracts of Sale or to their formation where the parties have their places of business in those States (94(2)). If a State which is the object of a declaration under 94(2) subsequently becomes a contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new contracting State, have the effect of a declaration made under article 94(1), provided that the new contracting State joins in such declaration or makes a reciprocal unilateral declaration. Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Norway, or Sweden.

2.07 The purpose of the declaration in article 94(1) is to permit contracting States which have the same or closely related legal rules on matters governed by the Convention to continue to apply those rules, rather than those of the Convention, to contracts of sale or their formation when the parties have their places of business in such States. Article 94(2) is concerned with a somewhat different situation where a contracting State which has the same or closely related legal rules on matters governed by the Convention as one or more non-contracting States wishes to exclude the application of the Convention to contracts of sale or to their formation when the parties have their places of business in those States. Clearly, since the State which is the object of the declaration is not a contracting State, it is only by way of a unilateral declaration that the contracting State can achieve its aim, a declaration which it may make at any time. The practical effect of such a declaration would seem to be that since the possibility of the Convention's applying under article 1(1)(a) is *ab initio* excluded as both parties do not have their places of business in contracting States, a court in a contracting State which made a declaration under article 94(2) would, if the rules of private international law were to lead it to designate its own law as the applicable law, apply its own national law governing contracts for the sale of goods and their formation, including any special rules of its law which might be applicable to international sales²⁸.

Article 94(3) addresses the situation in which a State which is the object of a declaration under 94(2) becomes a contracting State. The Convention provides that a declaration made under article 94(2) will as from the date on which the Convention enters into force in respect of the new contracting State, have the effect of a declaration made under article 94(1), provided that the new contracting State joins in such declaration or makes a reciprocal unilateral declaration. Failure by the new contracting State to make such a declaration will mean that the

28 See C.M. Bianca & M.J. Bonell, *Commentary on the International Sales Law the 1980 Vienna Sales Convention*, Milan, Giuffrè, 1987 p.652.

original declaration, although it continues to exist, will not enjoy the status of a joint or reciprocal unilateral declaration under article 94(1) and will thus have no more practical effect than a unilateral declaration made by a contracting State in relation to another contracting State under article 94(1) to which the latter State fails to respond.

2.08 A contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11 and 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 State. This is intended for States which consider the requirement of a written form for international sales contracts to be indispensable. It permits such contracting States to make a reservation which excludes application of the Convention's provisions contrary to the written form requirement to contracts of any party whose place of business is in that State. Such a reservation may be made at any time that is, not only at the time of signature, ratification of, or accession of interested State to the Convention, but also at any subsequent time. Upon ratifying the Convention the Governments of Argentina, Beyelorussian S.S.R., Chile, Hungary, Ukranian S.S.R. and U.S.S.R. made this reservation and China declared itself not bound by article 11. Many Commonwealth jurisdictions would find this reservation inapplicable as in many countries section 4 of the Statute of Frauds of 1677 has been repealed with the result that nearly all contracts for the sale of goods can now be made by word of mouth, irrespective of the value of goods sold. In States where section 4 has not been repealed it is important to note that article 11 does away with the application of the Statute of Frauds in international sales contracts.

2.09 Any State may declare at the time of becoming party to the Convention that it will not be bound by article 1(1)(b) of the Convention (article 95). A State prior to adhesion should determine whether it wishes the Convention to apply only when both parties to a contract are in Convention countries, or also whenever the contract should be governed by the States' law, even if the other party is in a country not party to the Convention. It will be recalled that in accordance with article 1(1) the Convention applies to Contracts of Sale of goods between parties whose places of business are in different States either (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. If this declaration were made by a State the Convention would apply only to contracts in which one contracting party had its place of business in that State and the other in another State which was also a party to the Convention. The Convention would not apply where one contracting party had its place of business in the Convention State and the other in a State which was not a party to the Convention but where the law of a contracting State was to be applied to the contract by virtue of conflict of law rules. The law of a contracting State which would be applied to the contract in such circumstances is likely to be the Convention State's law. It would not be

advisable to restrict the application of the Convention in this way except where perhaps the State in question has modern special legal rules that govern international commercial transactions. This is often not the case in many Commonwealth countries. In many of them the law of sale of goods is based mainly on the 1893 English Sale of Goods Act, various other statutory provisions of varying importance and a considerable mass of case law interpreting the 1893 Act. It is more often the case that such law is geared to govern domestic sales contracts. The United States of America, China and Czechoslovakia have made declarations under article 95. But the United States, has a relatively modern sales law provided by the Uniform Commercial Code. Germany declared that it would not apply article 1(1)(b), in respect of any State that had made a declaration that that State would not apply article 1(1)(b). The German declaration seems to have little practical effect. In any case, declarations under Article 95 become of increasingly less significances as additional States have become party to the Convention.

2.10 Of the Commonwealth States that have adhered to the Convention, Australia, Lesotho and Zambia, none declared at the time of deposit of the instrument of ratification that it would not be bound by article 1(1)(b) of the Convention. Where a State wishes to make such a declaration the form of the declaration might be as follows:

"[The Contracting State] in accordance with article 95 of the Convention, declares that it will not be bound by article 1 subparagraph (1)(b) of the Convention and will apply the Convention to Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States."

2.11 No difficulties would seem to exist with regard to this provision if a court in a State making the reservation under article 95 (State A) finds its own law applicable, but a problem might arise if such a court were to find the law of another contracting State (B) to be applicable to the contract of sale or its formation in a case involving parties with their places of business in (State B) and in a non-contracting State (State C). The problem facing a court in State A would be to determine whether the law of State B, if that country's law is held to be applicable to the contract, is to be regarded as its own internal law or rather the rules of the Convention. The task of the court in State A would be facilitated if State B had also taken a reservation under article 95 since it would be clear that the intention of the legislature was that, apart from the case contemplated by article 1(1)(a), the domestic law of State B, rather than the rules contained in the Convention, should govern international contract of sale of Goods whenever the law of State B is deemed to be applicable. The situation would, however, be less clear if State/B has not taken a reservation under article 95²⁹, since it is then clear that the intention of the legislature in State B was that the Convention should apply and the courts in State B would apply the Convention if the litigation were to arise there.

29. Ibid, pp.656-657.

(d) Legislative provisions

2.12 Legislation will be necessary to give effect to the Convention in most Commonwealth States. In exceptional cases, such as that of Cyprus, the Convention may be self-executing. It is, however, better that even in those States the application of the Convention should be properly resolved by municipal legislation in the interest of certainty.

2.13 A draft bill, drawing in its principal particulars from the Australian Sale of Goods (Vienna Convention) Act 1986 passed to give effect to the Convention in the State of Queensland follows: