

The Vienna Convention

An international trap for local players

by GERARD KENNEDY



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The UN Convention on Contracts for the International Sale of Goods (1980) forces its way, uninvited, into contracts for the sale of goods.

More commonly known as "the Vienna Convention" or in some quarters as "CISG", the Convention governs the formation of contracts of sale and the rights and obligations of the

buyer and seller arising from the international contract. It is not concerned with the validity of the contract or the effect it has on the property in the goods. Nor is it concerned with ownership claims of third parties and public liability claims for death and personal injury.

The Convention is self-inclusive, so it must be dealt with by express exclusion or else by proper consideration. If it is not excluded and if the contract falls under the umbrella of the Convention, then to the extent that individual clauses in the contract do not contradict the Convention it forms part of your contract.

APPLICATION

The aims of the Convention are to:

- bring uniformity to the rules which govern contracts for international sale of goods;
- remove legal barriers in international trade; and
- promote the development of international trade.

It applies first if both parties to the contract are from countries which have ratified the Convention ("contracting states"), and second when the rules of private international law lead to the

Being self-inclusive, the Vienna Convention impacts on the work of commercial lawyers dealing with international contracts on a daily basis; if ignored, it raises the spectre of negligence claims against contract drafters and litigators.

application of the law of a contracting state. According to Magraw & Kathrein:¹ "The principal impact of this (second) provision on traders of a contracting country appears to be that the Convention would be applicable in a greater number of cases, but at the expense of the contracting country's domestic law."

As at 1996 the following countries had ratified it: Argentina, Australia (Australian external territories except Christmas, Cocos and Ashmore and Cartier Islands), Austria, Belarus, Bosnia & Herzegovina, Bulgaria, Canada (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Northwest Territories, Quebec, Saskatchewan, Yukon), Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Mexico, Moldova, Netherlands (Aruba), New Zealand, Norway, Poland, Romania, Russia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, USA, Venezuela, Yugoslavia and Zambia.



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It is important to note that many of Australia's trading partners have accepted the Convention. Notably the United Kingdom has deliberately opted out (it has instead adopted the Hague Sale of Goods Convention).

As it says, the Convention applies to "goods". It does not apply to sales of goods bought for personal use, sales by auction, stocks, shares, investment securities, negotiable instruments, money, ships, hovercraft, vessels, aircraft or electricity, but it applies to everything else bought and sold between parties whose businesses are in contracting states.

EFFECT ON CONTRACTS

The Convention was incorporated into Victorian law by the *Sale of Goods (Vienna Convention) Act 1987*. This Act contains the text of the Convention, repeals s9 of the *Goods Act 1958* and substitutes a new s126 for the old ss126 and 127 of the *Instruments Act 1958*.

Section 9 of the *Goods Act 1958* said that a sale of goods of a certain value was not enforceable unless, among other things, there was a note or memorandum in writing made by the party to be charged.

Section 126 of the *Instruments Act 1958* said various agreements were unenforceable unless there was a memorandum in writing. Section 127 related to dealings in land. The new s126 says actions on guarantees, indemnities, etc., and sales or dispositions of interests in land must be in writing to be enforceable. The necessity that existed under these two Acts for written evidence of the contract of sale has been removed.

The Convention has four parts and 101 Articles. The first part ("Sphere of Application") deals with the matters I have already mentioned together with matters of interpretation, usage, place of business and the like.

Most important, Article 11 states that a contract of sale need not be evidenced by writing and may be proved by any means including witnesses. However, Article 96 makes provision for a country to accept the Convention with the rider that Article 11 (and other provisions requiring formalities) does not apply. It would be prudent for lawyers to encourage clients to include or assert, in their initial negotiations, that they will not be bound until a written document is signed.

Part 2 of the Convention is entitled "Formation of the Contract". It establishes:

- when a proposal constitutes an offer;
- what constitutes a sufficiently definite proposal;

- when a proposal is an invitation to make an offer;
- when an offer is effective;
- when an offer may be withdrawn;
- when an offer can and cannot be revoked;
- what constitutes acceptance;
- when an acceptance becomes effective or is not effective (acceptance can be indicated by the performance of an act established by usage);
- what constitutes a counter offer and what does not;
- the commencement point for time based offers;
- the effect of last day of offer term falling on a non-business day;
- late acceptance;
- withdrawal of acceptance; and
- conclusion of contract.

Of this part Magraw & Kathrein says: "These formation provisions embody carefully negotiated compromises between civil law and common law concepts. The Convention rejects the civil law presumption that offers are irrevocable in favor of the common law presumption of revocability with a 'firm offer' exception similar to that of the Uniform Commercial Code (UCC s2-205). Although an acceptance will not be effective until it reaches the offeror (thus rejecting the common law 'mailbox rule'), the Convention does provide for what arguably is the most important effect of the common law rule: an offeror may not revoke an offer once an acceptance is despatched."

Part 3 is entitled "Sale of Goods" and comprises the following chapters:

Chapter 1. General Provisions.

Chapter 2. Obligations of Seller (what, how, and where) including:

- 2.1 Delivery of goods and handing over documents;
- 2.2 Conformity of goods and third party claims;
- 2.3 Remedies for breach of contract by the seller.

Chapter 3. Obligations of Buyer including:

- 3.1 Payment of the price;
- 3.2 Taking delivery;
- 3.3 Remedies for breach of contract by the buyer.

Chapter 4. Passing of Risk.

Chapter 5. Common Provisions:

- 5.1 Anticipatory breach and instalment contracts;
- 5.2 Damages;
- 5.3 Interest;
- 5.4 Exemptions;
- 5.5 Effects of avoidance;
- 5.6 Preservation of goods.

In particular Part 3 establishes:

- a definition of fundamental breach. This becomes relevant in avoidance clauses in the Convention;

- that a party can still rely on a notice where there has been delay or error in transmission; and
- that entitlement to require performance of an obligation does not necessarily bind a court with jurisdiction to order specific performance.

There is no substitute for careful reading of this Part.

OBLIGATIONS

In order to convey a feeling of this Part I have included part of an article by Glower W Jones² as follows:

"Generally, the obligations of buyers are relatively simple. The buyer must pay the price of the goods and take delivery of them (Article 53). This is the essential obligation, although the Convention proceeds to provide other requirements for the buyer to fill gaps where the parties may not have specified terms such as weight of the goods (Article 56), place of payment (Article 57), time of payment (Article 58) and other details for taking delivery, and remedies for breach of contract by the buyer.

"The weight of the performance is substantially on the seller, as is the traditional position, to assure that the goods meet the order. It is in this area where the condition

and quality of the goods are regulated by the Convention. For the seller, the critical issue is what complies with proper performance. Do the goods meet the required quality and purpose? The obligation of the seller is to deliver goods which are of the quality, quantity and the description required by the contract (Article 35). The goods must be packaged as required by the contract. Unless agreed otherwise, the Vienna Convention prescribes specific requirements in order for goods to conform to the contract. Goods do not conform to the contract unless they are fit for the purposes for which goods of the same descriptions would ordinarily be used (Article 35(2)(a)). If made known to the seller at the time of the contract, goods are to be fit for the particular purpose, expressly or impliedly made known to the seller, except in situations where the buyer did not rely on the seller's skill and judgment or where it was unreasonable for him to do so (Article 35(2)(b)). Goods must have the qualities which the seller held out to the buyer as a sample or model (Article 35(2)(c)). The buyer may not rely upon these required qualities if he knew or could not have been unaware of lack of conformity at the time of the contract (Article 35(3)).

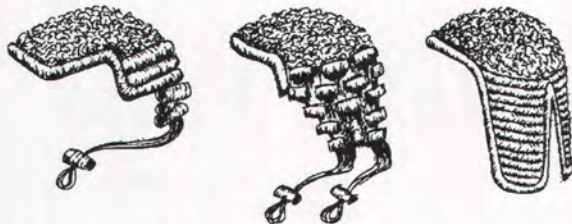
"The Convention deals with the time when conformity is required. The seller is liable only until the risk passes to the buyer that the goods conform to the Convention requirements, even though lack of conformity becomes apparent only after that time unless there is a guarantee for a period of time which the goods will remain fit for ordinary purposes or for some particular purpose or will retain specific qualities or characteristics (Article 36).

"Damages for breach of contract include the loss, including lost profit, suffered as a consequence of the breach, but may not exceed the loss which the party in breach foresaw or should have foreseen at the time of the contract (Article 74).

"The duty to mitigate damages in the case of breach is specified by the Convention, requiring that a party who relies on breach of contract take measures that are reasonable under the circumstances to mitigate the loss (Article 77).

"While not called *force majeure*, the Convention provides exemptions from performance based on frustration of contract concepts and excuses liability for performance when a party is unable to perform due to an impediment beyond his control that he could not reasonably be expected to have taken into account at the time of

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the contract, or to have avoided or overcome it or its consequences (Article 79).

"The Convention also recognises the concept of the common law implied duty not to prevent performance of the other party. A party may not take advantage of the failure of the other party to perform if that failure was caused by an act or omission of the first party (Article 80). An act or omission within your control that prevents performance cannot be the basis for a claim against the other party."

EN GARDE

As at the end of January 1997 the Internet revealed that there had been over 2000 articles written and many abstracts of cases reported in *Clout*³ relating to the Convention. No doubt there have been many more arbitrations and unreported cases than those abstracted in *Clout*. So there is a small but fast growing body of law on the Convention and more articles than you can poke a stick at. Their number is indicative of its importance.

Whether you are drawing a contract for a one-off transaction or terms and conditions for your client's invoice, the Convention demands consideration. If you are drawing terms and conditions you must

take the view that your client will use them for importing/exporting.

Professor Mary Hiscock⁴ recently outlined the three major issues highlighted by the cases reported to date as:

- a demonstration of the ignorance of the Convention;
- areas which fall outside the Convention (more than one-third of cases); and
- clarification of the provisions of the Convention.

There is a lesson here for lawyers involved in litigation. If you are involved with a matter relating to an international contract for the sale of goods, have you ascertained whether the Convention applies? Have you pleaded the Convention if it is applicable?

It is entirely possible that losses resulting from ignorance of the Convention will be underwritten by the professional indemnity insurance of lawyers around the world. Lest we forget!

On the other hand, there are ways of converting knowledge of the Convention to your professional advantage. Market your knowledge by:

- sending a general letter to your commercial clients; or
- targeting clients for whom you have done terms and conditions in the past; or

- looking up clients for whom you have done distribution agreements or buy/sell agreements.

In my experience, every time I distribute a flyer on terms and conditions it brings in work.

You can take either an "opt out" or "opt in" approach:

- opt out: "The rights and obligations of the parties under this agreement shall not be governed by the provisions of the United Nations Convention on Contracts for the International Sale of Goods (1980)" or, as discussed above, advise clients to inform prospective contractors that only a written agreement will be binding; or
- opt in: use the Convention as a guide when drafting. You will readily pick up what you want to contradict by including your own clauses covering your client's intentions. There are gaps in the Convention which you will need to address as you go. ■

Notes

1. *The Convention for the International Sale of Goods: A handbook of basic materials*, American Bar Association, 1990.
2. "Impact of the Vienna Convention in drafting international sales contracts" *International Business Lawyer*, September 1992, p424.
3. UN Commission on International Trade Law.
4. At the Law Council of Australia workshop and update on international trade and investment, Melbourne, November 1996.

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