AN ASSESSMENT OF THE VIENNA SALES CONVENTION

By Michael Pryles*

The desirability of having a uniform law on the international sale of goods has long been felt. In the 1930s the International Institute for the Unification of Private Law (UNIDROIT) initiated work on such a law. Later, work was commenced on a uniform law for the formation of contracts. These culminated in two conventions which were adopted in April 1964 at the Hague. One was entitled the Uniform Law for the International Sale of Goods and the other was called the Uniform Law on the Formation of Contracts for the International Sale of Goods. Both conventions entered into force in 1972 following ratification by five states. These conventions attracted few accessions, however, and did not prove very popular. In order to obtain broader international acceptance it was recognised that a new convention would have to be drafted. In 1969, the United Nations Commission on International Trade Law (UNCITRAL) decided to take up work on preparing a new convention. A working group consisting of a cross section of UNCITRAL's world-wide representation was assembled and this culminated in the preparation of a draft convention, in June 1978, dealing with both international sales contracts and the formation of such contracts. In March 1980 a diplomatic conference met in Vienna and finalised and adopted the United Nations Convention on Contracts for the International Sale of Goods ('The Vienna Sales Convention').

While the 1964 Hague Conventions attracted few adherents, which were for the most part European states, the Vienna Sales Convention has already attracted a much more extensive and diverse membership. The following countries are already parties to the Convention: Argentina, Australia, Austria, China, Denmark, East Germany, Egypt, Finland, France, Hungary, Italy, Lesotho, Mexico, Norway, Sweden, Syria, United States of America, Yugoslavia and Zambia. It is expected that there will be further ratifications. The present list includes both common law and civil law countries, western and socialist and developed and third world countries. It is an indication of the universal acceptability of the Convention.

The Convention entered into force in Australia on 1 April 1989. It is implemented by uniform state legislation entitled the Sale of Goods (Vienna Convention) Act. Section 5 of the Act provides that the Convention has force of law in the State of enactment and section 6 provides that the Convention prevails over any law in force to the extent of any inconsistency. The relationship of the Convention and the Trade Practices Act is discussed below.

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FEATURES OF AND PHILOSOPHIES UNDERLYING THE CONVENTION

Comprehensiveness

The Convention is very comprehensive. It totals some 101 articles and contains detailed provisions setting out the obligations of the seller and the obligations of the buyer, the passing of risk in the goods, obligations imposed on the parties to preserve the goods, breach of contract and its consequences including avoidance of a contract, other remedies and entitlement to damages. Not only does the Convention deal with the terms and conditions of the substantive contract between the seller and the buyer but it also contains rules on the preliminary question of formation of the contract. In Part II the Convention sets out those legal rules which establish whether the parties have actually concluded a binding agreement. It should be noted that Article 92(1) enables a contracting state to make a ratification that it will not be bound by Part II of the Convention. Australia has not made such a ratification. Despite its comprehensive nature, there are a number of omissions in the Convention. These include validity, consumer sales, property in the goods and product liability.

VALIDITY

Article 4 paragraph (a) provides, *inter alia*, that except as otherwise provided in the Convention, it is not concerned with 'the validity of the contract or of any of its provisions or of any usage'. Thus national laws which prohibit or restrict the sale of certain goods, such as national artifacts or works of art, can still apply consistently with the Convention. Honnold[1] suggests that Article 4 also preserves the special rights and remedies that domestic law gives to persons who have been induced to enter into a contract by fraud. The selection of the appropriate domestic law to govern these questions will be effected in accordance with the forum's rules of choice of law. It should be noted, however, that a complementary Convention to the Vienna Sales Convention dealing with choice of law has recently been included. The Convention on the Law Applicable to Contracts for the International Sale of Goods was adopted at the diplomatic conference at the Hague in 1985. It aims to unify the choice of rules applied in national courts.

CONSUMER SALES

By Article 2(a) the Convention does not apply to 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 or ought to have known that the goods were bought for any such use. Consumer sales are subject to special protective rules in most countries and it was therefore thought desirable to exclude consumer transactions from the ambit of the

1 Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer 1982), 96–97

Convention. It should be noted that the definition of a consumer transaction under the Convention is not identical to that which exists in Australia under the Trade Practices Act. In particular, many transactions which will be regarded as consumer transactions and therefore subject to the mandatory provisions of the Trade Practices Act would not fall within the definition of a consumer transaction in Article 2(a). The Trade Practices Act has been amended, however, and section 66A now provides as follows:

> The provisions of the United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna, Austria, on 10 April 1980, prevail over the provisions of this Division to the extent of any inconsistency.

The insertion of section 66A is to ensure that Australia does not breach its international obligations under the Vienna Sales Convention. But, the philosophy behind the Convention and the Trade Practices Act illustrates an interesting conflict. The Trade Practices Act's provisions on consumer protection are mandatory provisions which cannot be excluded by the parties; they are now, however, subject to the Vienna Sales Convention which itself is not a mandatory provision but a law which can be excluded by the parties. So, section 66A has made the mandatory law give way to a directory law. Indeed by some drafting, it may be possible to have the Convention apply under Article 1(l)(b) and thereby exclude the application of the mandatory provisions of the Trade Practices Act. An interesting question arises as to whether section 66A would have the effect of excluding the trade practices legislation in cases where the Convention was prima facie applicable under Article 1 but where the parties had themselves excluded the application of the Convention pursuant to Article 6.

PROPERTY IN THE GOODS

A contract for the sale of goods involves both contractual elements (the agreement between the parties) and property elements (the transfer of property from the seller to the buyer). Article 4(b) provides that the Convention is not concerned with the effect which the contract may have on the property in the goods sold.

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. Of course in many instances where there may be a claim for damages arising from the death or injury the Convention will be inapplicable in any event as the transaction will be a consumer sale within Article 2(a). But a nonconsumer sale could give rise to a claim for damages for death or personal injuries. The buyer may have purchased the goods for use in his own business and if the buyer is injured as a result of the goods being defective, such a claim cannot be made under the Convention.

An interesting question arises where the seller in country A sells to a buyer in country B, the buyer then resells the goods to a retailer who then sells them to a consumer. The consumer suffers personal injuries after using the goods and brings an action against the retailer. The retailer then

seeks indemnification or contribution from the importer and the importer makes a like claim against the seller in country A. Is the claim one for contribution or indemnification and therefore outside Article 5 or is it one which is properly classified as applying 'to the liability of the seller for death or personal injury caused by the goods to any person'?

Neutrality

A problem that was perceived to exist with regard to the earlier Hague Conventions was that they were documents prepared by western European states and were not necessarily suitable for other legal systems. The Vienna Sales Convention aims to be neutral in the sense of being acceptable to diverse legal systems, common law and civil law, western and socialist. Experts from many broad countries participated in the drafting of the Convention and its ratification by a diverse range of countries indicates that the drafters have succeeded in their task. The Convention also aims to be neutral in the sense of neither favouring sellers nor buyers. A convention which was biased towards sellers would be regarded as one appropriate for developed countries (which are frequently exporters of goods) and less appropriate for developing countries which are mainly buyers of goods. Overall, the Convention seems to strike a fair balance between the interests of both contracting parties.

Maintenance of the Agreement

The Convention has as a dominant principle the maintenance of the agreement between the parties. This is evidenced in a number of ways. In the first place a number of articles seek to ensure that the contract is not avoided or terminated on technical or trivial grounds. As Honnold has noted[2] in international sales the problem of avoidance has special significance because of the cost of transporting goods to a distant buyer and the difficulty of disposing of rejected goods in a foreign country. The policy of saving the contract wherever possible is implemented by the following provisions in the Convention. Some articles permit a party in breach to cure the deficiency in performance.[3] Secondly, the Convention confines the right of an injured party to avoid a contract on the basis of the other party's breach unless such breach is fundamental.[4] Further an aggrieved party who faces nonperformance may fix an additional period of time of reasonable length for performance. This has the additional advantage of clarity and certainty. Upon the failure of the party to perform within the additional time, the innocent party is entitled to avoid the contract. Prior to the effluxion of such time, avoidance is only possible if the other party's breach is fundamental. This may not be clear.[5] Thirdly, an injured party may lose the right to rely on the breach of contract if notice is not given within a reasonable time.[6]

2 Honnold, *op. cit.*, 65.
3 See Arts. 34, 37 and 48.
4 Arts. 25, 49 and 64.
5 See Arts. 47, 49(1)(b), 63 and 64(1)(b).
6 Arts. 39, 43.

The importance of the agreement between the parties is illustrated in another way. The Convention allows the parties to strike their own bargain. The rules in the Convention are only intended to apply in the absence of a contrary agreement by the parties. Thus the Convention's rules are in the nature of subsidiary rules which are always subject to displacement by the parties. The matter is placed beyond doubt by Article 6 which declares 'the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions'.

Clearly the parties can limit the application of the Convention in whole or part by resorting to Article 6. But can the right conferred upon the parties by Article 6 be used to give the Convention a broader application than it would otherwise have? For example, 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. Could the parties in reliance on Article 6 delete Article 5 from their contract so as to make the Convention applicable to liability for death or personal injury? By Article 2(e) the Convention does not apply to sales of ships, vessels, hovercraft or aircraft. Again, could the parties, in reliance in the power conferred by Article 6, exclude this provision and so make the Convention applicable to ships etc.? Indeed, could the parties depart from the basic Article 1 which deals with the sphere of application of the Convention and make it applicable to sales which are not international sales as defined in that Article? Honnold[7] discusses the history of Article 6 and notes that there was no unanimity amongst the drafters on this point. But, he concludes[8] 'the actions and discussions in UNCITRAL were based on the premise that, in most situations, agreements to apply the convention would be effective'. In truth, it is probably impossible to give one comprehensive answer. Perhaps the parties are able to extend the scope of the Convention but in some cases there may be limits to what can be achieved. Also it may be necessary to distinguish between the application of the Convention by virtue of the act of the parties and application of the Convention under its own terms. The parties are always free in a contract to agree to such terms and conditions as they wish subject only to mandatory rules of the proper law. Parties could always incorporate the terms and conditions of the Convention in this way.

The maintenance of the agreement between the parties is a broad concept. It encompasses not only the enforcement of the written agreement between the parties (strictly speaking by Article 11, there is no need for the contract of sale to be concluded or evidenced in writing) but also to any usage or practices which have been established between them. Thus Article 9(1) provides that 'the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves'. Usage established in international trade is also incorporated by Article 9(2) which says:

7 Honnold, *op. cit.*, 106–112.
8 Honnold, *op. cit.*, 109.

> the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Simplicity

The drafters of the Convention apparently intended it to be a law which would be comprehensible to laymen as well as lawyers. It was hoped that the document would be clear enough for businessmen to refer to and understand. In consequence, the Convention tends to avoid the use of legal terms of art such as *force majeure*. In any event resort to such technical legal terms would be hazardous because there would always be the risk of different interpretations under the various legal systems. Further, the Convention tends to avoid the use of abstract legal concepts such as the passing of property. Thus, while under domestic Anglo-Australian law the risk in the goods prima facie passes from the seller to the buyer when property in the goods is transferred, the rules adopted in the Convention are otherwise because there is no reference to the passage of property. In any event, the effect which the contract may have on the property and the goods sold is expressly excluded from the Convention by Article 4(b).

It must be said that the Convention is a remarkably legible document. It would be a mistake to assume, however, that a layman can safely rely on his own interpretation of the Convention and should not seek legal assistance. Many of the provisions are inter-related and a thorough knowledge of the entire Convention is desirable if not essential in order to approach concrete problems and determine what the legal situation is.

Preservation of the Goods

Following the 1964 Hague Convention on Sales (ULIS) the Vienna Sales Convention contains a number of provisions imposing obligations on the parties to preserve goods in the event of a dispute. As Professor Honnold has pointed out[9] these provisions are designed to prevent the loss or deterioration of goods when a dispute prevents their acceptance or retention by the buyer. A party who is in the best position to care for the goods is given the responsibility to do so whether or not he is in breach of contract. Similarly, the Convention's provisions on the passing of risk are designed to minimise loss by placing responsibility for the safety of the goods on the person who is in the best position to prevent damage or loss. The party in breach remains responsible for damage including, of course, any costs incurred by the other party in preserving the goods.

The provisions concerning the preservation of goods and the passing of risk are illustrations of one of the principles underlying the Convention. As mentioned above, the Convention tends to avoid the use of abstract legal concepts. Consequently, the passing of risk is not dependent on transfer of property in the goods and the duty to preserve the goods is not predicated on the concept of which party is in breach of its obligations. In both cases the rules are largely based on a physical fact — the posses-

9 Honnold, *op cit.*, 456.

sion of goods. Generally the risk in the goods passes when possession passes and the obligation to preserve goods is placed on the party in possession.

APPLICATION AND INTERPRETATION OF THE CONVENTION

Application

The Convention is, of course, only applicable to certain contracts. Its application is predicated on a number of distinct factors which include:

INTERNATIONAL SALES

The Convention is only intended to establish a uniform law for international sales. It would have been an unduly ambitious undertaking, if not an impossible one, to attempt to unify the various national laws applicable to wholly domestic sales. As the Convention is only aimed at international sales, this necessitates a definition of what an international sale is. There are a number of possibilities. In the first place an international sale could be predicated on the movement of goods between two or more countries. This was not the definition chosen by the framers of the Vienna Sales Convention. Article 1(1) emphatically declares that the Convention applies to contracts of sale of goods 'between parties whose places of business are in different States'. Thus the test of the international character of the contract is predicated on the parties and not on the international transfer of goods. As far as the parties are concerned the connecting factor is their place of business and not their ordinary residence or domicile. This definition is open to criticism in that it ignores that requirement of the international transfer of goods. Take the following example. An American company owns a number of caravans which are situated in a yard in Melbourne. It sells those caravans to a French company which intends to retail them in Melbourne. Under the Convention, the contract would be considered 'international' because the parties have their places of business in different States. As the goods were at all times in Australia, however, and were never intended to be shipped from that country, the sale to some extent lacks an international element. Conversely there are situations where a sale appears to be international and yet the Convention will not apply. Thus, if one Australian company owns a quantity of timber which is situated in Fiji and it sells that timber to another Australian company on terms that the timber is to be shipped to a mill owned by the Australian buyer in New Zealand, the contract would not be an international sale within the Convention but it would involve the international transit of goods.

Article 1(1) focuses on the place of business of the parties. This is further defined in Article 10. By paragraph (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance having regard to the circumstances known to or contemplated by the parties at any time before or at

the conclusion of a contract. Article 10(b) goes on to provide that if a party does not have a place of business, reference is to be made to his habitual residence.

There is one circumstance where the Convention does not apply even though the parties have their places of business in different states. By Article 1(2) 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.

The fact that the international character of the contractors is predicated on the place of business means that other factors such as the nationality of the parties is not relevant. This is confirmed by Article 1(3).

THE CONTRACTING STATE LIMITATION

Not only must the buyer and the seller have their places of business in different states but there is also a requirement that the states concerned be contracting states. This requirement appears in two slightly different forms. By Article 1(1) 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;
(b) when the rules of private international law lead to the application of the law of a contracting state.

Let us first consider paragraph (a). It requires that the parties' places of business both be situated in contracting states. A contracting state is a country which is a party to the Vienna Sales Convention. Thus the Vienna Sales Convention adopts a narrow or restrictive interpretation of the concept of internationality by imposing this limitation. In contrast, other Conventions have taken a 'universalist' approach and have not imposed the requirement that the states concerned be contracting states. For example, the Convention on The Law Applicable to Contracts for the International Sale of Goods concluded at the Hague in 1985 and intended to complement the Vienna Sales Convention declares in Article 1(a) that the Convention applies to contracts of sale of goods 'between parties having their places of business in different states'. The requirement that the states be contracting states certainly narrows the application of the Vienna Convention, but contracting parties may be able to avoid the application of this restriction by taking advantage of the freedom conferred by Article 6. Another possibility is to make the Convention applicable by resorting to Article 1(1)(b).

Paragraph (b) provides that the Convention will apply 'when the rules of private international law lead to the application of the law of a contracting state'. The reference to the rules of private international law in this context is a reference to the rules which each country has for determining the legal system applicable to an international contract. Generally, most countries permit contracting parties to choose the law governing their contract. Thus if a buyer and seller, who have their places

of business in different states, select the law of an Australian state or of any other country which is a party to the Convention, to govern their contract, the Convention becomes applicable.

A number of countries did not entirely approve of paragraph (b) and in consequence Article 95 was included within the Convention. This Article enables any state to declare at the time when it ratifies or accedes to the Convention that it will not be bound by Article 1(l)(b). Australia has not made any such reservation and in consequence Article l(l)(b) applies in this country.

The existence of a ratification of this provision can cause difficulties. Let us assume, for example, that an Australian buyer enters into a contract to sell goods to a purchaser in Fiji. The goods are presently in China. Is the Convention applicable? It could not apply under Article 1(1)(a) because Fiji is not a contracting state and therefore both parties do not have their places of business in different contracting states. There is a possibility though, that the Convention could apply under paragraph (b). Let us assume that the parties choose the law of Victoria or New South Wales to govern the contract. They have chosen the law of a contracting state (or part of a contracting state) and the Convention would apply under paragraph (b). But what if they had chosen the law of, say, China? Let us assume that China, which is a party to the Convention, has made the ratification provided for in Article 95 and does not apply the Vienna Convention in the circumstances set out in Article 1(1)(b). If litigation or arbitration proceedings were to take place in China, the Chinese would say that the Convention is not applicable because both parties do not have their places of business in contracting states and they do not recognise the applicability of the Convention under Article 1(1)(b). If litigation or arbitral proceedings occurred in Australia, however, a different result would seem to follow. By the rules of private international law in Australia the contract would be governed by the law of China. China is a contracting state and prima facie, therefore, Article 1(1)(b) would seem to make the Convention applicable. However there is a contrary argument. One might query why a Convention should be applicable under that paragraph when the law governing the contract, that of China, does not recognise the applicability of the Convention in the same circumstances.

GOODS

The Convention is, of course, confined to contracts of the sale of goods. 'Goods' is not defined. There are, however, some specific exclusions stated in article 2. By Article 2 paragraphs (d), (e) and (f) the Convention does not apply to sales of stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity. Some of these excluded items may not be considered goods in domestic law such as electricity and possibly negotiable instruments and money. In any event, they are specifically excluded. Clearly, however, ships, vessels, hovercraft and aircraft would be goods. They too are excluded. The 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods likewise excludes sales of stocks, shares, investments, securities, negotiable instruments and money. It spe-

cifically includes the following, however — ships, vessels, boats, hovercraft, aircraft and electricity. Thus the Hague Convention is a little more expansive than the Vienna Sales Convention.

The fact that the goods are to be manufactured and are not yet in existence at the date of the conclusion of the contract does not mean that the contract is outside the Convention unless the party who orders the goods undertakes to supply a substantial part of the materials.[10] By Article 3(2) the Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. Thus, an Australian who visits a dentist in New York and obtains an amalgam filling does not contract within the Vienna Sales Convention although there is a transfer of goods (the amalgam filling).

SALES

The Convention is of course confined to contracts 'of sale'. There are two points to note in relation to this factor. Some sales are specifically excluded. By Article 2(b) and (c) the Convention does not apply to sales by auction or on execution or otherwise by authority of law. Thus, for example, an Australian who bids by telephone at an international art auction conducted in New York does not contract within the Vienna Sales Convention because the sale is by way of auction. Sales by way of execution or otherwise by authority of law are different to ordinary commercial transactions because generally the parties are not able to negotiate the terms of the contract and the effect of the contract may be subject to special regulations.

The usual type of sale is where goods are exchanged for money. Sometimes, however, goods are exchanged for goods. Does the Convention apply to barter agreements? In this regard it should be noted that the Convention does not define 'sales contract'. But provisions of the Convention indicate that it is concerned with agreements to exchange goods for money. Thus Article 30 defines the obligation of the seller as one to deliver the goods, hand over any documents relating to them and transfer property in the goods. On the other hand, the obligation of the buyer is stated in Article 53 to be the payment of the price for the goods and the taking delivery of them. Detailed provisions are contained in the Convention as to the time and place for the payment of the price. Thus, the overall impression is that the Convention is only concerned with contracts whereby goods are exchanged for money.

TEMPORAL APPLICATION

The Convention is not retrospective in nature. It does not apply to contracts made prior to its coming into operation. Article 100 sets out two temporal rules. The first deals with the application of Part II of the Convention which is concerned with the formation of the contract. Article 100 (1) provides that the Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the

10 See Art. 3(1).

date when the Convention enters into force in respect of the contracting states referred to subparagraph (1)(a) or the contracting state referred to in subparagraph (1)(b) of Article 1. Thus where the applicability of the Convention is dependent on the first provision, subparagraph (a), the proposal for concluding the contract must be made after the Convention enters into force in both the respective contracting states. In relation to the second subparagraph, reference is only made to the single contracting state there referred to.

In relation to the other provisions of the Convention, Article 100 (2) provides that the Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the contracting states referred to in sub-paragraph (l)(a) or the contracting state referred to in subparagraph (l)(b) of Article 1.

EXCLUSION BY THE PARTIES

We have already discussed Article 6 which confers on the parties the ability to exclude the application of the Convention in whole or in part. Thus, where the Convention is applicable by virtue of its terms, it can nevertheless be excluded by the parties. A converse situation was also discussed, namely whether the parties can give to the Convention an application beyond that which it ordinarily has.

Interpretation

THE CONVENTION

It is an old adage that a law means what the courts say it means. Therefore the interpretation of a law is an important matter. Methods and rules of interpretation tend to vary from country to country and there is a real danger that the Convention will be given a different operation by the various national judges who will read it through domestic lenses. In an effort to overcome this situation, Article 7(1) states:

> In the interpretation of this 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.

But the Convention does not say how these objects are to be attained. Clearly, however, the provision constitutes a directive not to interpret the Convention in a narrow and pedantic way and as if it were a domestic statute. It is to be hoped that judges will display an internationalist attitude in interpreting the Convention and will be prepared to rely on the preparatory materials of UNCITRAL as well as decisions given by courts in other countries.

Article 7 goes on to deal with gaps in the Convention and provides in subarticle (2) that

> questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Thus, if the Convention does not contain an express provision covering a particular point, the direction is first to see whether there is a general principle in the Convention which could be applied to deal with the matter and, if not, recourse is to be had to a domestic law selected in accordance with the rules of private international law.

The point has been made that civilian lawyers will perhaps be more prepared to discover general principles in the Convention than will common lawyers. Consequently, it is likely that civilian lawyers will rarely have to go beyond the Convention to find the applicable legal rule while lawyers from common law countries may tend to more readily fall back on a domestic law. In the words of Honnold:

> Many legal systems work from the premise that solutions to legal problems can and must be found within the four corners of the Code — a premise that compels the extension by analogy of one or another of the Code's provisions. Other legal systems take a more strict view of statutes. For example, statutes like the (UK) Sale of Goods Act may be regarded as Islands in an Ocean of uncodified common law; in this setting if the statute does not readily supply an answer the court may draw on general common-law ideas.[11]

Precisely the same point is made by Professor Volken.[12]

INTERPRETATION OF STATEMENTS AND CONDUCT OF THE PARTIES

Lawyers are familiar with two approaches to interpreting statements. One is the subjective approach which aims to discover the true meaning of the maker of the statement. The other is the objective approach which is based on what a reasonable person would understand was meant by the statement. Article 8 of the Convention adopts elements of both of these approaches. By Article 8(1) it is provided that statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. Thus the subjective interpretation is adopted if this was or should have been clear to the other party. But in other cases an objective intent is adopted. Thus, Article 8 (2) provides that if the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as that other party would have had in the same circumstances. This is further elaborated in subarticle (3) which states that in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

CONVENTION RULES AND AUSTRALIAN DOMESTIC LAW

The Convention, of course, contains many rules on the formation of the contract and on the substantive operation of the contract itself. In

11 Honnold, *op. cit.*, 62.

12 Volken and Sarcevic, *International Sale of Goods* (Oceana Publications 1986), 42–44.

the context of this paper, it is not possible to examine the individual rules in any depth nor indeed is it possible to note all the rules themselves. I will confine myself to making a few general observations and then will refer to some specific rules to illustrate some differences between the Convention and the existing provisions of Australian domestic law.

To an Australian lawyer, many of the Convention's rules are familiar or at least readily understandable. Some, then, are in accord with our law or at least are not very far removed from it. But of course the Convention is not simply a codification of Anglo-Australian law: other Convention rules differ from our domestic law. I would not say that the Convention rules are noticeably inferior to our rules, nor would I say that they are obviously superior. They are simply different.

In making some specific observations about particular rules I intend to highlight some of the differences between the Convention and domestic Australian law. While the rules have not been chosen at random, I do not claim that my observations are comprehensive in any way.

There are some departures from Australian law in the rules set out in Part II on the formation of the contract. In the first place the important common law requirement of consideration does not appear in the Convention. Secondly, under Article 16(2) some offers are irrevocable in circumstances when they would still be revocable at common law. The rule about acceptance of an offer, stated in Article 18(2), follows the common law rule but does not contain the exception relating to postal acceptances. At common law an acceptance by post is effective on the posting of the acceptance and not on its receipt by the offeror. The obligations of the seller and the obligations of the buyer are set out in Chapter II and Chapter III of Part III. Again there is much similarity with our domestic law. Thus the implied terms as to fitness of goods stated in Article 35(2) closely resemble those implied by Australian Goods Acts. But some differences, of course, exist. For example the implied term as to packaging of the goods contained in Article 35 (2)(d) has no express counterpart in the Goods Act. The effect of a delivery by the seller of an incorrect quantity of the goods also differs under the Convention and Australian domestic law. Article 51 of the Convention deals with delivery of only part of the goods contracted to be sold. By Article 51(2) the buyer may declare the contract avoided in its entirety only if the failure amounts to a fundamental breach of contract. In contrast, section 37(1) of the Goods Act 1958 (Vic.) enables a buyer to reject a short quantity of goods.

I have already mentioned the passing of risk from the seller to the buyer. The significance of passing of risk is dealt with in Articles 66 and 70 of the Convention. By Article 66, loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price unless the loss or damage is due to an act or omission of the seller. The time when risk passes from the seller to the buyer is predicated on different concepts in the Convention and Australian domestic law. Under our law, prima facie risk is passed when property in the goods is transferred.[13] The Convention does not deal with the passing of the property

13 *Cf.* Goods Act 1958 (Vic.) s. 25.

(title), however, and hence its rules as to the passage of risk cannot be predicated on that concept. Instead the Convention bases the passing of risk primarily on possession of the goods. These rules are stated in Articles 67 to 69.

The right of an injured party to avoid the contract (terminate) exist both under the Convention and Australian domestic law. The position is rather complicated at common law as modified by the goods legislation. Generally, the injured party is given a right to terminate a contract if the other party has breached a condition as distinct from a warranty. But under the goods legislation in Australia the breach of a condition can sometimes only be treated as breach of the warranty and does not give rise to a ground for treating the contract as repudiated.[14] Further, breaches with regard to particular terms of the contract are subject to special rules.[15] Under the Convention a distinction is drawn between a fundamental breach of contract and other breaches. A fundamental breach is defined in Article 25 as:

> A breach of contract committed by one of the parties. . .[which] results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract unless the party in breach did not foresee and a reasonable person of the same kind in the circumstances would not have foreseen such a result.

Under the Convention an injured party can generally only avoid a contract if the breach is fundamental. As it may be difficult to determine whether a breach is fundamental in the circumstances, other provisions of the Convention confer a right on the injured party to fix an additional period for performance of the obligation following which the injured party may avoid the contract if performance has not occurred during that time.[16] The right to avoid the contract is, however, further compromised by other articles.[17]

As to remedies in general, the Convention places a greater emphasis on specific performance than is possible under domestic Australian law. Thus, for example, Article 46(1) provides that the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. Likewise, Article 46(3) provides that if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair. Generally, under Australian law, the remedy of specific performance is not available unless the goods possess some unique quality. By Article 62 of the Convention the seller may require the buyer to pay the price or perform his other obligations. Under Australian law the seller can generally only bring an action for the price if the property and the goods has passed to the buyer. Where it has not he is confined to suing for damages for non-acceptance.[18]

In relation to the remedy of specific performance, particular attention should be paid to Article 28. It provides as follows:

14 *E.g.* Goods Act 1958 (Vic.) s. 16(3).
15 Goods Act 1958 (Vic.) ss. 37 and 38.
16 *E.g.* Arts. 47(1), 49(1), 63(1), 64(1).
17 *E.g.* Art. 49(2), Art. 64(2).
18 Goods Act 1958 (Vic.) ss. 55 and 56.

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Thus, where a seller wrongfully refuses to deliver goods, the buyer cannot demand specific performance of the seller's obligations in Australia unless the court would award the remedy of specific performance in a similar domestic transaction.

The Convention contains some remedies which are not expressly available under domestic Australian law. Thus, for example, Article 50 provides that if the goods do not conform with the contract, the buyer may reduce the price.

I have mentioned the detailed provisions which the Convention contains in Articles 85 to 88 concerning the preservation of goods. They are designed to prevent the loss or deterioration of goods when a dispute arises between the parties. These provisions go beyond our domestic law. Section 54(3) of the Goods Act 1958 (Vic.) confers on an unpaid seller the right to sell perishable goods and to recover from the original buyer damages for any loss occasioned by his breach of contract. There is also a general obligation to mitigate damages and this may sometimes require sale of the goods.

EVALUATION

The rules in the Convention seem fair to both buyers and sellers. Moreover, the philosophies underlying the Convention are basically sound. These include the principle of allowing the parties to draft their own contract, attempting to preserve the contract and prevent it being avoided on technical or trivial grounds, placing responsibilities in relation to the goods on the party having possession of the goods and having a Convention which seeks to avoid technical legal terms and concepts. For a Convention which seeks to cover common law and civil law, western and socialist, developed and third world legal systems, it is a remarkably comprehensible document and possesses an admirable degree of clarity.

While the Vienna Sales Convention has a limited application by virtue of the provisions of Article 1, an astute contractor can give it a broader operation by choosing as the governing law of a contract the law of a state which is a party to the Convention. In many cases, this will result in the application of the Convention by virtue of Article 1(1)(b).

Even where the Convention applies by its own force, the parties are always free to exclude it in whole or in part. This leads to the question of whether an Australian contractor should accept the application of the Convention or should exclude it. My own view is that it is impossible to give a single definitive answer to this question. Rather, the answer depends on the circumstances of each importer and exporter and must be based on an evaluation of the following factors among others:

1. the bargaining power of the contracting parties;
2. the attitude of both parties as to the governing law;
3. the nature of the contract and the goods sold;

4. whether the written contract is detailed and extensive or whether it is brief;
5. whether the transaction between the parties is a one-off transaction or is part of a continuing relationship;
6. the nature of dispute resolution clauses in the contract and where disputes are likely to be resolved;
7. the relative sophistication and experience of the contracting parties.

Ultimately, the selection of the law to govern a contract and the acceptance or exclusion of the Vienna Sales Convention is one important matter to be considered when drafting an international contract. It well illustrates the point that an international contract has considerations which are not present in domestic contracts and which warrant close scrutiny.

THE 1985 HAGUE CONVENTION

If there were true uniformity of law between countries there would be no need for the rules of private international law. A decision as to which country's law governed a matter would not be important if both countries had the same rules. The Vienna Sales Convention aims to establish common rules on contracts for the international sale of goods, but even where the Convention applies it is not all embracing and the rules of private international law continue to play a role. This is illustrated by the following provisions in the Vienna Sales Convention.

Article 1(1)(b) makes the applicability of the Convention depend upon, *inter alia*, the rules of private international law leading to the application of the law of a contracting state. Article 7(2) provides that questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Thus gaps in the Convention are to be referred to a domestic legal system selected in accordance with the rules of private international law.

Article 4(a) provides that the Convention is not concerned with the validity of the contract or of any of its provisions or of any usage. Thus, the validity of a contract must be referred to a national system of law selected in accordance with the rules of private international law. Each country has its own rules on private international law. While there is some similarity between the rules, differences do remain. Consequently, to bolster the harmonisation sought to be effected by the Vienna Sales Convention, it was thought desirable to conclude a parallel Convention on the private international law rules applicable to international contracts for the sale of goods. The result is the Convention on the Law Applicable to Contracts for the International Sale of Goods concluded at the Hague in 1985. The Convention is the work of the Hague Conference on Private International Law, an inter-governmental organisation of which Australia is a member. Australia has ratified several of the Hague Conventions but has yet to decide whether to ratify the 1985 Convention.

The Hague Convention is designed to complement the Vienna Sales Convention and a number of articles in the Hague Convention closely mirror corresponding articles in the Vienna Sales Convention. As far as the choice of law rules themselves are concerned the primary rules are set out in Articles 7 and 8. These provide as follows:

> 1. A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.
> 2. The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties.

> 1. To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.
> 2. However, the contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if —
> a. negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State:
> or
> b. the contract provides expressly that the seller must perform his obligation to deliver the goods in that State:
> or
> c. the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).
> 3. By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.
> 4. Paragraph 3 does not apply if, at the time of the conclusion of the contract, the seller and the buyer have their places of business in States having made the reservation under Article 21 paragraph 1 sub-paragraph b.
> 5. Paragraph 3 does not apply in respect of issues regulated in the United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980) where, at the time of the conclusion of the contract, the seller and the buyer have their places of business in different States both of which are Parties to that Convention.

Considerations of space prevent me examining in any depth the provisions of the 1985 Hague Convention, but its existence and relationship to the Vienna Sales Convention is a matter of some importance.