

# Formation of Contracts in Louisiana Under the United Nations Convention for the International Sale of Goods

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# Formation of Contracts in Louisiana Under the United Nations Convention for the International Sale of Goods<sup>1</sup>

## I. INTRODUCTION

Foreign trade has become increasingly important to the economies of both the United States and Louisiana.<sup>2</sup> In the last forty years, the economic interdependence among nations has steadily grown,<sup>3</sup> so much so that "no nation can afford to ignore the international dimensions of economic policy."<sup>4</sup> As such, it has been for many years a policy of the United States Government to promote international trade, and the government has made efforts to remove or lessen the various types of trade barriers.<sup>5</sup> These barriers include the uncertainty surrounding which country's law governs in a particular transaction, what the rights and obligations of the parties are under the law which does apply, and the difficulty and expense of proving foreign law in court.<sup>6</sup> The United States took a major step toward removing these obstacles to international commerce by ratifying the United Nations Convention on Contracts for the International Sale of Goods (hereinafter Convention)—a uniform law for international sales.

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 671 [hereinafter Convention]. The official text appears in Annex I of the Final Act of 1980 Vienna Conference (U.N. Doc. A/CONF. 97/19 (1980)).

2. In 1991, U.S. exports accounted for 7.6% of the GNP. Louisiana ranked sixth among the fifty states in exports; over 21% of Louisiana's economy was based on exports. *Statistical Abstract of the United States 1991*, 111th Edition, U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census.

3. The increased economic interdependence among nations is evidenced by the existence of organizations such as the EEC (European Economic Community), OECD (Organisation for Economic Co-operation and Development), LAFTA (Latin American Free Trade Agreement), ASEAN (Association of Southeast Asian Nations), GATT (General Agreement on Tariffs and Trade), ICC (International Chamber of Commerce), the International Bank for Reconstruction and Development (the World Bank), ICSID (International Centre for Settlement of Investment Disputes), NAFTA (North American Free Trade Agreement), and many others. See 2 Basic Documents of International Economic Law (Stephen Zamora & Ronald A. Brand eds., 1990); Directory of European Institutions (Gerhard Hitzler ed., 1991).

4. *Proposed United Nations Convention on Contracts For the International Sale of Goods: Hearings on Treaty Doc. 98-9 Before the Committee on Foreign Relations United States Senate*, 98th Cong. 2d Sess., 1 S. Hrg. 98-837 (1984) (statement of Senator Mathias [hereinafter Hearings]).

5. *Id.* at 29 (prepared statement of Peter H. Kaskell).

6. *Id.*

The Convention became the law in the United States on January 1, 1988. By virtue of the treaty power,<sup>7</sup> it supersedes state commercial law.<sup>8</sup> This means that in Louisiana, the Convention, rather than the Louisiana Civil Code, will govern international sales. However, under the terms of the Convention, the parties to the sale may choose to exclude their transaction from the application of the Convention altogether or derogate from or vary the effect of any of its provisions.<sup>9</sup> Consequently, in negotiating international sales contracts, Louisiana businesses must weigh the advantages and disadvantages of applying the Convention as opposed to Louisiana sales law found in the Civil Code. Louisiana businesses and their counsel should become familiar with the provisions of the Convention in order to avoid any surprises. While much of the Convention is either the same or similar to the Louisiana Civil Code's sales provisions, a few of the provisions under the Convention vary significantly from those in the Civil Code. Nevertheless, Louisiana businesses may find that the long-term benefit to be derived from having certainty in international trade law through a uniform law on international sales will outweigh the temporary inconvenience of having a law other than Louisiana sales law governing their transactions.

This is especially true in light of the fact that the proposed 1993 revision of Louisiana sales law will significantly change the prior law, resulting in greater conformity with the Convention. If the Legislature adopts the proposed revision, not only will Louisiana's domestic sales

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Under the Supremacy clause of the United States Constitution, the "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land. . . ." The U.N. Convention is a self-executing document and therefore became binding law in the United States through the Supremacy clause on its effective date in 1988.

Steven J. Stein, *Sales Contracts and the Impact of the U.N. Convention on the International Sales of Goods on U.S. Business*, in *International Commercial Agreements 1990: Handling Basic Problems in Negotiating, Drafting, and Litigating*, 49, 55 (Michael Gruson ed., 1990) (citations omitted).

8. See Hearings, *supra* note 4 (statement of Frank A. Orban III).

The ratification of this Convention [was] a unique use of the treaty power, since it [was] the first time in U.S. history that the treaty power ha[d] been employed to effect private (as opposed to "public") domestic law reform. In this case, reform of private commercial law, an area traditionally and internationally reserved to the states.

9. Article 6 of the Convention provides: "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." See *infra* note 30 for discussion of proper exclusion language.

law be more similar to the Convention, but it will also be more in line with the rest of the states in the United States.<sup>10</sup> Consequently, the benefits of the revision to Louisiana businesses will be two-fold: not only will Louisiana businesses benefit in their international negotiations from uniformity in international law and closer uniformity between domestic and international sales law, but more foreign businesses will be encouraged to do business in Louisiana. The introduction to the proposed revision of Louisiana sales law reiterates the importance in today's worldwide economy of the unification and harmonization of both international and domestic sales law:

While it was becoming increasingly obvious that the Louisiana Civil Code articles on sales were insufficient to meet the needs of Louisiana citizens, legislative innovations in the area of sales, both in the United States and abroad, made the agedness of the sales articles of the Louisiana Civil Code and the urgency of their revision glaringly clear. Article 2 of the U.C.C. and the 1980 Convention on International Sales are recent legislative models providing realistic approaches to contemporary sales problems that stand in sharp contrast to the elegant, yet outdated, provisions of the Louisiana Civil Code. Those two bodies of law, as well as various other contemporary models, could not be ignored.<sup>11</sup>

This comment will first discuss the history of the Convention followed by a brief overview of the process by which the United States ratified the Convention. It will then outline the purposes and scope of the Convention as well as its general structure. Finally, it will highlight some of the significant provisions of the Convention as they compare to both the present and the proposed revision to the Louisiana sales law in the Civil Code. This article will be limited to a discussion of the formation of the contract under the Convention.

## II. THE CONVENTION

### A. *History of the Convention*

The process of developing a uniform law for the international sale of goods began in the 1930s when the International Institute for the Unification of Private Law (UNIDROIT), a private organization under

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10. The proposed revision adopts many of the Article 2 provisions of the Uniform Commercial Code which deal with sales.

11. Introduction to proposed revision of the Louisiana Civil Code provisions on sales. H.R. 1369, Regular Sess. (1992).

the auspices of the League of Nations, requested a group of Western European legal scholars to prepare a draft of a uniform law for the international sale of goods. The group issued a preliminary draft in 1935, but suspended work during World War II. After the war, work resumed, and in 1956 and 1963, drafts were circulated among the countries for comments. In the meantime a draft of the uniform law for the formation of contracts was circulated in 1958.<sup>12</sup> The United States joined the negotiations in 1964.<sup>13</sup> In April, 1964, a Diplomatic Conference of twenty-eight countries convened at the Hague to consider the two drafts. The two conventions, the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts (ULF), were finalized. Following ratification by a minimum of five countries in 1972, both conventions went into effect as between the ratifying countries.<sup>14</sup>

As early as 1964, when the conventions were finalized, most countries recognized that the 1964 Hague Conference would not receive worldwide acceptance.<sup>15</sup> Because the majority of the work on the conventions had been done by Western European scholars, many countries, particularly those with different legal backgrounds, were not satisfied with the results and felt that they had not been adequately represented.<sup>16</sup> In 1966, a resolution by the General Assembly of the United Nations provided for the establishment of a worldwide representative body to promote "the progressive harmonization and unification of the law of international trade."<sup>17</sup> This body, called the United Nations Commission on International Trade Law (UNCITRAL), was limited in membership to thirty-six countries. However, the membership was allocated among the regions of the world: Africa, nine; Asia, seven; Eastern Europe, five; Latin America, six; Western Europe and Others, nine. The United States, Australia, and Canada were included in the "Others" category.

One of UNCITRAL's priorities at its first session in 1968 was international sales. In 1969, UNCITRAL appointed a fourteen-member working group on sales, of which the United States was an active participant. The group was "to consider what changes in ULIS would

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12. E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 Int'l Law. 17 (1984).

13. Henry Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 Int'l Law. 29 (1984).

14. The countries that adopted the ULIS and the ULF included Belgium, Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, Netherlands, San Marino, and the United Kingdom (with a reservation making the law effective only by agreement of the parties). See Farnsworth, *supra* note 12, at 17-18.

15. *Id.*

16. *Id.* at 18.

17. *Id.*

make it more acceptable to countries of varied legal, social, and economic systems—particularly to countries outside the Western European group that had dominated the drafting of ULIS.”<sup>18</sup> By 1978, the group completed the Draft Convention on Contracts for the International Sale of Goods which received the Commission’s unanimous approval. In March of 1980, representatives of sixty-two countries and eight international organizations<sup>19</sup> met in Vienna to finalize the UNCITRAL Draft Convention. The Convention was finalized in six official and equally authentic languages: Arabic, Chinese, English, French, Russian, and Spanish. The final product of nearly half a century of work was approved by the ninety-two countries at the Vienna conference without a dissenting vote in April, 1980.

### *B. United States Participation and Ratification*

The United States did not become involved in the formulation of an international sales law until 1964 when the Uniform Law on International Sales (ULIS) and the Uniform Law on the Formation of Contracts (ULF) were adopted at the Hague Conference. The United States did not participate in the preparation of either of those drafts. Consequently, the ULIS was mainly the product of civil law oriented Western European countries.<sup>20</sup>

In the formation of the Convention on the International Sale of Goods, the United States’ role was dramatically different. Because the United States was represented in UNCITRAL and the working group on sales, it was closely involved in the formulation of the new Convention. As a result, the Convention was based much more on common law than the ULIS had been.<sup>21</sup> The Convention was thus more favorable to American industries and businesses, which were accustomed to doing business under the Uniform Commercial Code (UCC). On October 9, 1986, the United States Senate ratified the Convention. Along with China and Italy, the United States deposited its ratification with the Secretary-General of the United Nations on December 11, 1987, becoming the ninth, tenth, and eleventh countries to sanction the Convention.<sup>22</sup> On January 1, 1988, twelve full months after its adoption by ten countries,

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18. *Id.*

19. See John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 54 (2d ed. 1991).

20. Landau, *supra* note 13, at 30.

21. *Id.*

22. Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C. J. Int’l. L. & Com. Reg. 109 (1988).

the Convention became effective.<sup>23</sup> In ratifying the Convention, the United States exercised its option not to be bound by Subparagraph 1(1)(b) of Article 1.<sup>24</sup> As a result, the Convention only applies to international sales contracts with parties whose places of business are in different contracting states.<sup>25</sup> Thus, "in cases where a U.S. party contracts with a party in a non-contracting state, and the conflicts laws of the forum lead to application of U.S. law, the Convention would not require its application rather than permitting the UCC to apply."<sup>26</sup>

### C. Purpose and Scope of the Convention

A uniform law on international sales was a much needed and timely development in international trade law, as evidenced by the relatively rapid, worldwide acceptance of the Convention by countries with various legal, social, and economic backgrounds. Prior to the Convention, companies and countries were faced with tremendous legal uncertainties in

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23. Article 99 of the Convention provides: "This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession . . . ."

24. Article 95 of the Convention provides: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."

Subparagraph (1)(b) of Article 1 of the Convention provides that the Convention will apply "when the rules of private international law lead to the application of the law of a Contracting State."

This reservation was recommended by the American Bar Association as well as the State Department because it would "promote maximum clarity in the rules governing the applicability of the Convention." "The rules of private international law, on which applicability under subparagraph (1)(b) depends, are subject to uncertainty and international disharmony. On the other hand, applicability based on subparagraph (1)(a) is determined by a clear-cut test: whether the seller and buyer have their places of business in different Contracting States." Message From the President of the United States Transmitting the United Nations Convention on Contracts for the International Sale of Goods, Senate Treaty Doc. No. 98-9, 98th Cong., 1st Sess. 21 (1983) [hereinafter Message]. Another reason for excluding subparagraph (1)(b) was that the provision would "displace our own domestic law more frequently than foreign law." *Id.*

25. Contracting states as of May, 1992 (by effective date): Argentina (8/1/84), Australia (4/1/89), Austria (1/1/89), Belarus (11/1/90), Bulgaria (8/1/91), Canada (5/1/92), Chile (3/1/91), China (1/1/88), Czechoslovakia (4/1/91), Denmark (3/1/90), Ecuador (2/1/93), Egypt (1/1/84), Finland (1/1/89), France (9/1/83), Germany (1/1/91), Guinea (2/1/92), Hungary (7/1/84), Iraq (4/1/91), Italy (1/1/88), Lesotho (7/1/82), Mexico (1/1/89), Netherlands (1/1/92), Norway (8/1/89), Romania (6/1/92), Russian Federation (9/1/91), Spain (8/1/91), Sweden (1/1/89), Switzerland (3/1/91), Syrian Arab Republic (11/1/83), Uganda (3/1/93), Ukraine (2/1/91), United States of America (1/1/88), Yugoslavia (4/1/86), and Zambia (7/1/87). For an updated list of contracting states: Treaty Section, Office of Legal Affairs, United Nations, New York, NY 10017, (212) 963-3918.

26. Hearings, *supra* note 4, at 8 (statement by Peter H. Pfund).

international sales transactions. “[D]oubt as to which legal system [would] apply and [the] difficulty of coping with unfamiliar foreign law”<sup>27</sup> were just some of the problems the parties faced. Additionally, disagreement as to which party’s domestic law would apply would sometimes “prolong and jeopardize the making of the contract.”<sup>28</sup> “By unifying and codifying an international law of sales, the Convention [gave] international traders a ready-made fall back position when disagreeing on the applicable law.”<sup>29</sup>

[Another] major need for the Convention’s uniform law arises from the fact that the buyer and the seller do not anticipate every question that might arise or consider it essential to deal with every problem, and it is often inexpedient to hold up the transaction until the parties find a solution for all foreseeable contingencies. In short, the Convention . . . serves the significant function of providing solutions for problems that the parties have failed to resolve by contract.<sup>30</sup>

The Convention applies to the formation and performance of the contract when it is not clear by the terms of the contract which law applies or when the Convention is specifically invoked by the contract. The Convention does not, however, prevent the parties from establishing their full rights and obligations under the contract or from modifying or excluding the Convention altogether.<sup>31</sup>

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27. Message, *supra* note 24, at v.

28. *Id.*

29. Zwart, *supra* note 22, at 110.

30. Message, *supra* note 24, at v.

31. Convention, *supra* note 1, art. 6, 19 I.L.M. at 673. Attorneys should be very specific on the choice of law provisions. If a Louisiana business wants to opt out of the Convention and use the Louisiana Civil Code instead, the contract should not merely provide that “the laws of the State of Louisiana apply.” As of January 1, 1988, the Convention will apply automatically to certain international transactions. Therefore, such a provision is open to the interpretation that the Convention, not the Civil Code, will be “the law of the state of Louisiana” in a transaction between two countries that have adopted the Convention. William A. Hancock, *The Convention on Contracts for the International Sale of Goods Compared with the Uniform Commercial Code*, in *Guide to the International Sale of Goods Convention 106.01, 106.02* (William A. Hancock ed., 1992). Rather, parties should expressly negate the application of the Convention if that is their intent. For example, the clause might provide: “The rights and obligations of the parties under this agreement shall not be governed by the provisions of the 1980 Convention on Contracts for the International Sale of Goods; rather, these rights and obligations shall be governed by the law of the State of Louisiana, including its provisions of the Louisiana Civil Code.” See B. Blair Crawford & Janet L. Rich, *ALI-ABA Course of Study, Going International: International Trade for the Nonspecialist, New Rules For Contracting in the Global Marketplace: The United Nations Convention on Contracts for the International Sale of Goods (“CISG”), 115, 117 (1989).*



In addition to the limitations the parties may place on the Convention's application, the Convention itself is limited in its scope of application. It only applies to international contracts for the sale of commercial goods,<sup>32</sup> it does not apply to consumer sales.<sup>33</sup> In the United States, the Convention only applies to contracts between parties whose places of business are in different contracting states.<sup>34</sup> The Convention does not apply to contracts for the sale of services.<sup>35</sup> If the contract is for the sale of goods as well as for services, the Convention will not apply if "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."<sup>36</sup> In addition, the scope of the Convention's application is limited to particular issues: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."<sup>37</sup> To encourage worldwide adoption, the Convention did not encompass subjects considered too controversial for agreement.<sup>38</sup> Thus, the Convention is not concerned with issues such as the validity of the contract,<sup>39</sup> property rights resulting from the contract (i.e., ownership),<sup>40</sup> or product liability.<sup>41</sup> These issues are still decided according to domestic law.

#### D. General Structure of the Convention

Part I contains articles concerning the scope of application of the Convention as well as general provisions which are to apply to the entire Convention. The major focus of these general provisions is on the interpretation of the Convention and the international sales contract. For example, Article 7 provides that in interpreting the Convention, three major principles should be considered: the international character

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32. Convention, *supra* note 1, art. 2(a) 19 I.L.M. at 672.

33. *Id.*

34. Pursuant to Article 95 of the Convention, the United States declared "that it [would] not be bound by subparagraph (1)(b) of article 1," which provided for the application of the Convention "when the rules of private international law lead to the application of the law of a Contracting State."

35. Convention, *supra* note 1, art. 3(2), 19 I.L.M. at 672.

36. *Id.*

37. *Id.* art. 4, 19 I.L.M. at 673.

38. Zwart, *supra* note 22, at 111.

39. See Convention, *supra* note 1, art. 4(a), 19 I.L.M. at 673. Issues relating to the validity of contract which the Convention does not cover include as fraud (*dol*), duress, error, and capacity.

40. *Id.* art. 4, 19 I.L.M. at 673.

41. *Id.* art. 5, 19 I.L.M. at 673. This article excludes only personal injury damages caused by goods. Property damages are covered by the Convention. See Fritz Enderlein & Dietrich Maskow, *International Sales Law* 47 (1992).

of the Convention, the need for uniformity in its application, and the observance of good faith in international trade.<sup>42</sup> In addition, “[q]uestions 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 . . . .”<sup>43</sup> This provision “reinforces regard for both the Convention’s ‘international character’ . . . and ‘the need to promote uniformity in application’ . . . by minimizing recourse to divergent rules of domestic law . . . .”<sup>44</sup>

Part II concerns the formation of the contract. It is subject to the rules of Part I, but is independent of Part III which deals with the obligations of the buyer and seller to the contract.<sup>45</sup> The first four articles of Part II deal with the offer: criteria for an offer,<sup>46</sup> withdrawal,<sup>47</sup> revocation,<sup>48</sup> and termination of an offer.<sup>49</sup> The next five articles deal with acceptance and include provisions for “acceptances” that do not match the offer,<sup>50</sup> the period allowed for acceptance,<sup>51</sup> and withdrawal of an acceptance.<sup>52</sup> The final articles relate to the time when a contract is concluded.<sup>53</sup>

Part III is subject to the provisions in Part I but is independent of Part II. Once a contract has been formed, Part III governs the obligations of the buyer and seller under that contract. Part III, the “Sales Part,” has five chapters. Chapter I contains the general provisions which are applicable to the rest of Part III.<sup>54</sup> Chapter II deals with the obligations of the seller including the buyer’s remedies if the seller fails to perform its obligations.<sup>55</sup> Chapter III, which parallels Chapter II, deals with the obligations of the buyer and the seller’s remedies if the buyer fails to perform its obligations.<sup>56</sup> Chapter IV is mainly concerned with risk of loss,<sup>57</sup> while Chapter V contains provisions common to the obligations of the seller and the buyer.<sup>58</sup>

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42. Convention, *supra* note 1, art. 7(1), 19 I.L.M. at 673.

43. *Id.* art. 7(2), 19 I.L.M. at 673.

44. Honnold, *supra* note 19, at 161.

45. Article 92 permits a Contracting State to declare that it will not be bound by either Part II or Part III. The United States did not take advantage of this provision and is therefore subject to the provisions of both parts.

46. Convention, *supra* note 1, art. 14, 19 I.L.M. at 674.

47. *Id.* art. 15, 19 I.L.M. at 675.

48. *Id.* art. 16, 19 I.L.M. at 675.

49. *Id.* art. 17, 19 I.L.M. at 675.

50. *Id.* art. 19, 19 I.L.M. at 675-76.

51. *Id.* arts. 20-21, I.L.M. at 676.

52. *Id.* art. 22, I.L.M. at 676.

53. *Id.* arts. 23-24, 19 I.L.M. at 676-77.

54. *Id.* arts. 25-29, 19 I.L.M. at 677.

55. *Id.* arts. 30-52, 19 I.L.M. at 678-83.

56. *Id.* arts. 53-65, 19 I.L.M. at 683-86.

57. *Id.* arts. 66-70, 19 I.L.M. at 686-87.

58. *Id.* arts. 71-88, 19 I.L.M. at 687-92.

Part IV deals mostly with procedural and administrative matters.<sup>59</sup> Article 89 designates the Secretary-General of the United Nations as depositary for all documents which are required to be filed under the Convention, which is customary for conventions prepared by the United Nations.<sup>60</sup> Article 92 allows a Contracting State to exclude Part II or Part III of the Convention. Article 95 provides that "any state may declare . . . that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."<sup>61</sup> As noted earlier, the United States exercised this option when it deposited its instrument of ratification.<sup>62</sup> And, under Article 101, a Contracting State may denounce the Convention, or Part II, or Part III of the Convention, by formal written notification addressed to the depositary.

### III. SIGNIFICANT FEATURES—A COMPARISON OF THE CONVENTION AND THE LOUISIANA CIVIL CODE

Because of the disparity of the economic, political, and legal structures of the countries represented at the Vienna Conference, it was inevitable that compromises had to be made "in order to integrate different concepts and ideas into an independent, workable, and meaningful system of regulating international sales."<sup>63</sup> One of the major obstacles to be overcome in the unification process was reconciling the gaps existing between the civil law and the common law traditions. To accomplish this, each side had to make concessions. As a result, some of the Convention's provisions are based substantially on the common law and the Uniform Commercial Code. These provisions will be of significant interest to Louisiana businesses, for they deviate from the civil law tradition embodied in the present Louisiana sales law. This section will briefly outline the impact that these particular provisions of the Convention have on the present Louisiana sales law and also how this impact will be lessened by the proposed revision of Louisiana's sales law.

#### A. *Validity of the Contract under Domestic Law As a Prerequisite to Convention Application*

Because the Convention does not deal with issues concerning the validity of the contract, it does not apply to an international sales agreement unless the contract is valid under the domestic law of each

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59. *Id.* arts. 89-101, 19 I.L.M. at 692-95.

60. Honnold, *supra* note 19, at 586.

61. Convention, *supra* note 1, art. 95, 19 I.L.M. at 693.

62. *See supra* text accompanying notes 24-26.

63. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 Int'l Law. 443, 450 (1989).

party's country. "Thus, in the legal 'hierarchy' created by the Convention, the Convention itself ranks third—behind the mandatory rules of domestic law and . . . behind the parties' contract (since the parties can opt out of all or any one of the Convention's otherwise applicable provisions)."<sup>64</sup>

But, what exactly is meant by "validity of the contract?" A distinction must be made between formal validity and substantive validity.<sup>65</sup> "*Formal validity* may depend on keeping with provisions on form. . . . The Convention provides for this so that domestic law will apply only in exceptional cases, namely when a reservation is made against the freedom of form. Hence, this rule above all relates to the *substantive validity* of the contract."<sup>66</sup> Specific domestic contract law provisions will govern such issues of validity as fraud, capacity, duress, error, unlawful object, and unconscionability. For example, if a Louisiana business enters into a contract with a Mexican business, the Convention would apply because both the United States and Mexico have ratified it. However, if the contract were for the sale of marijuana, even if it were a valid contract under the Convention itself, it would be invalid because the sale of marijuana is unlawful in Louisiana. Thus, substantive validity of the contract under both countries' domestic law is a prerequisite to the application of the Convention.

#### B. Offer and Acceptance

While the Convention is not concerned with the validity of contracts, it is concerned with the formation of contracts. The formation of the contract through offer and acceptance was an area which revealed significant theoretical differences between the civil law and the common law. These differences were mainly in the areas of revocability of an offer and time of acceptance.

The Convention attempted to make a compromise to accommodate both common law and civil law doctrines. The resulting compromise, rather than solving the issue, only created confusion as to how the provision regarding revocability of an offer was to be interpreted.<sup>67</sup> First, the Convention, as a concession by civil law countries, adopted the UCC presumption of revocability of an offer.<sup>68</sup> This presumption is a

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64. Stein, *supra* note 7, at 59-60.

65. Enderlein & Maskow, *supra* note 41, at 43.

66. *Id.*

67. See Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 Am. J. Comp. L. 333, 354 (1983), in which he analyzes the nature of compromise. He places the compromise of Article 16(2) under the category of compromises which involve instances where at least two interpretations are possible. According to Eorsi, "[T]hese compromises, at least doctrinally, do not lead to a uniform law: the compromise that was necessary for the adoption of a Convention does not bridge the gap, only covers it up." *Id.* at 355.

68. Convention, *supra* note 1, art. 16(1), 19 I.L.M. at 675.

foreign doctrine to Louisiana lawyers because Louisiana law recognizes irrevocable offers.<sup>69</sup> However, the Convention provides for two instances when an offer will be deemed irrevocable: "if [the offer] indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable"; or "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."<sup>70</sup> These exceptions "may actually be read and interpreted so broadly as to empty the common law principle of revocability of offers of [Section] 1 of much of its content."<sup>71</sup> Thus, Louisiana lawyers should be able to interpret this provision as specifically providing that "if a fixed time for acceptance of the offer is stated, this necessarily also indicates that the offer is binding until the time stated, though not thereafter."<sup>72</sup>

The classic civil law approach to acceptance is that the acceptance is not effective until it has been received by the offeror.<sup>73</sup> Conversely, the common law adheres to the "mail box rule" according to which the acceptance is effective upon dispatch.<sup>74</sup> The Louisiana Civil Code takes an approach which is almost a combination of these two approaches. The Louisiana Civil Code makes a distinction between revocable offers and irrevocable offers. An acceptance of an irrevocable offer is effective when received by the offeror,<sup>75</sup> whereas an acceptance of a revocable offer is effective when transmitted by the offeree.<sup>76</sup> The Convention reaches a clear compromise on this issue. Article 18(2) provides that "[a]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."<sup>77</sup> However, Article 16(1) provides that an offer may only be revoked "if the revocation reaches the offeree before he has dispatched an acceptance."<sup>78</sup> "Thus, while receipt is crucial for the effectiveness of the offer, dispatch remains the standard to determine the timeliness of its revocation."<sup>79</sup> Since a

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69. Louisiana Civil Code article 1928 provides: "An offer that specifies a period of time for acceptance is irrevocable during that time. When the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time."

70. Convention, *supra* note 1, art. 16(2), 19 I.L.M. at 675.

71. Alain A. Levasseur, *The Civil Code of Quebec and the Vienna Convention on International Contracts for the Sale of Goods: Some Comments*, in *Conférences sur le nouveau Code Civil du Québec*, 269, 281 (Canadian Institute for Advanced Legal Studies ed., 1992).

72. Eorsi, *supra* note 67, at 354.

73. Garro, *supra* note 63, at 454.

74. *Id.* at n.48.

75. La. Civ. Code art. 1934.

76. La. Civ. Code art. 1935.

77. Convention, *supra* note 1, art. 18(2), 19 I.L.M. at 675.

78. *Id.* art. 16(1), 19 I.L.M. at 675.

79. Garro, *supra* note 63, at 455.

consequence of the Louisiana rule that a revocable offer is effective upon transmittal<sup>80</sup> is that the offer may not be revoked after dispatch of the acceptance, the results under Louisiana law and the Convention are practically the same.

### C. "Mirror Image" Rule

The "mirror image" rule provides that an acceptance that is not a "mirror image" of the offer (i.e., an acceptance that does not conform to the offer in every respect) constitutes a counter-offer and thus a rejection of the original offer.<sup>81</sup> This common law approach was adopted by Louisiana in Civil Code article 1943.<sup>82</sup> However, this strict approach proved to be an inadequate reflection of the reality of commercial sales transactions. Consequently, the U.C.C. introduced Section 2-207 in an effort to deal with the problems under the "mirror image" rule.<sup>83</sup> Louisiana, on the other hand, continued to adhere to the strict standard of Louisiana Civil Code article 1943.<sup>84</sup> The Convention adopts the "mirror image" rule in article 19(1) which provides that "[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."<sup>85</sup> However, section two of Article 19 provides an exception to the general rule:

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80. La. Civ. Code art. 1935.

81. Restatement of The Law Second, Contracts §§ 59, 60 (1981).

82. Louisiana Civil Code article 1943 provides that "[a]n acceptance not in accordance with the terms of the offer is deemed to be a counteroffer."

83. U.C.C. § 2-207 provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

84. In the 1984 revision of the Louisiana Civil Code, Article 1943 was adopted. It remains the law today.

85. Convention, *supra* note 1, art. 19(1), 19 I.L.M. at 675.

However, a reply to an offer 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 orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.<sup>86</sup>

This approach, as well as the U.C.C. approach (termed the "Battle of the Forms"),<sup>87</sup> is more practical and better suited to deal with acceptance that does not exactly match the offer in the context of a commercial sale than the approach adhered to by Louisiana Civil Code article 1943. Not surprisingly, the comments to the proposed revision of Article 1943 specifically refer to both section 2-207 of the U.C.C. and article 19(2) of the Convention as examples followed in proposed Article 1943.<sup>88</sup> The author of the comments recognizes (as the redactors of section 2-207 of the U.C.C. and article 19(2) of the Convention did) the impracticality of a strict "mirror image" rule:

An exchange of forms containing several varying provisions should not prevent the formation of an agreement when the parties intend to contract. When it is clear that the parties have agreed to undertake a sale transaction, one of them who later wishes to retract upon discovering that he has made a bad bargain, or is now able to strike a better deal, should not be able to repudiate his obligations by way of an arbitrary technicality that is unresponsive to the way sales are made in the business world of today.<sup>89</sup> The proposed revision adopts, under Articles 2601 and 2602, an approach which is substantially similar to the Convention (and the U.C.C. as well).<sup>90</sup>

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86. *Id.* art. 19(2), at 676. Article 19(3) goes on to define "material alterations": "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."

87. See generally Hawland UCC Series § 2-207 (art. 2).

88. Comments to revision articles 2601 and 2602 (replacing La. Civ. Code art. 1943), H.R. 1369, Regular Sess. (1992).

89. Introduction to Revision Articles, H.R. 1369, Regular Sess. (1992). Note also that the "source" of Article 2601 is listed as U.C.C. 2-207 and U.N. Convention on the International Sale of Goods, Art. 19.

90. Article 2601, H.R. 1369, Regular Sess. (1992). Additional terms in acceptance of offer to sell a movable:

An expression of acceptance of an offer to sell a movable thing suffices to form a contract of sale if there is agreement on the thing and the price, even though the acceptance contains terms additional to, or different from, the terms

#### D. Price

An essential element to an offer in a sales contract is the price. Under Louisiana's domestic sales law, if the price is not fixed or determined or determinable, the contract of sale is not valid.<sup>91</sup> On the surface, the Convention's price requirement is substantially similar, but a closer look reveals that there are some important differences. Article 14 of the Convention provides that "[a] proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."<sup>92</sup> While the support for requiring a definite price is evinced by the fact that Article 14 was included in the Convention, the opposition was strong enough from the common law countries to require a compromise. This compromise was reached not by amending Article 14, but by including Article 55 in the Convention.<sup>93</sup> Article 55 provides:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.<sup>94</sup>

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of the offer, unless acceptance is made conditional on the offeror's acceptance of the additional or different terms. Where the acceptance is not so conditioned, the additional or different terms are regarded as proposals for modification and must be accepted by the offeror in order to become a part of the contract.

Between merchants, however, additional terms become part of the contract unless they alter the offer materially, or the offer expressly limits the acceptance to the terms of the offer, or the offeree is notified of the offeror's objection to the additional terms within a reasonable time, in all of which cases the additional terms do not become a part of the contract. Additional terms alter the offer materially when their nature is such that it must be presumed that the offeror would not have contracted on those terms.

Article 2602, H.R. 1369, Regular Sess. (1992). Contract by Conduct of the Parties:

A contract of sale of movables may be established by conduct of both parties that recognizes the existence of that contract even though the communications exchanged by them do not suffice to form a contract. In such a case the contract consists of those terms on which the communications of the parties agree, together with any applicable provisions of the suppletive law.

91. La. Civ. Code art. 2464.

92. Convention, *supra* note 1, art. 14(1), 19 I.L.M. at 674.

93. George Dube, *The Civil Code of Quebec and the Vienna Convention on International Contracts for the Sale of Goods*, in *Conferences sur le nouveau Code Civil du Quebec*, 205, 217-18 (Canadian Institute for Advanced Legal Studies ed., 1992).

94. Convention, *supra* note 1, art. 55, 19 I.L.M. at 683.



These articles seem to conflict with each other, and legal scholars disagree as to their proper interpretation and application.<sup>95</sup> Because the interpretation of these articles is unclear, confusion exists as to whether open-price contracts are valid under the Convention. One interpretation is that Article 55 clearly provides that a contract with an unstated price may be validly concluded.<sup>96</sup> Conversely, some legal scholars interpret Article 55 to be "an empty set since it applies, according to its opening clause, only in cases 'where a contract has been validly concluded,' and if there is no reference to the price there can be no offer, hence no valid contract could have been concluded."<sup>97</sup>

The difference between Article 14 and Article 55 may also be reconciled through the operation of Article 4(a) of the Convention which provides that the Convention is not concerned with the validity of the contract.<sup>98</sup> Thus, if the applicable national law requires that the price be at least determinable, then the difference would be resolved.<sup>99</sup>

Because there is doubt as to how these differences will be resolved under the Convention, a Louisiana lawyer who is negotiating an international sale should consider the possibility that an open-price contract may be a valid contract. However, this problem may resolve itself if the Louisiana Legislature passes the proposed sales revisions. While revised Civil Code Article 2464 will still require that the price be "fixed by the parties in a sum either certain or determinable," revised Civil Code Article 2466 carves out an exception to this general rule: "When the thing sold is a movable of the kind that the seller habitually sells and the parties said nothing about the price, or left it to be agreed later and they fail to agree, the price is a reasonable price at the time and place of delivery." Thus, under the proposed revision, the possibility that the Convention may be interpreted to allow open price contracts will not present as big a problem to Louisiana lawyers as it does under the existing sales law in the Louisiana Civil Code.

#### IV. CONCLUSION

The increasing economic interdependence among nations as well as the growing importance of foreign trade over the last forty years de-

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95. Garro, *supra* note 63, at 464.

96. *Id.*

97. *Id.* See also Dube, *supra* note 93, at 218, and Patrick Thieffry, *Sale of Goods Between French and U.S. Merchants: Choice of Law Considerations Under the U.N. Convention on Contracts for the International Sale of Goods*, 22 *Int'l Law* 1017, 1030 (1988).

98. Dube, *supra* note 93, at 218.

99. *Id.*

manded and necessitated a uniform law for international sales. The United Nations answered this demand by establishing UNCITRAL, a worldwide representative body, which has as its purpose "the promotion of the progressive harmonization and unification of the law of international trade."<sup>100</sup> The result was the 1980 Convention on Contracts for the International Sale of Goods.

For Louisiana businesses, the Convention provides an effective solution to the legal uncertainties which arise in international trade negotiations. For the same reason, a uniform law on international sales encourages foreign companies to do business with Louisiana-based entities. Because a few of the provisions of the Conventions differ significantly from Louisiana's present sales law in the Civil Code, Louisiana businesses and their legal counsel should familiarize themselves with the provisions of the Convention to avoid any surprises.

Louisiana businesses should also be aware of the fact that, as an acknowledgement of the realistic approach the Convention takes to contemporary sales problems and, conversely, the outmoded approach that exists under the Civil Code provisions on sale, Louisiana is proposing to revise the current domestic law on sales in the Civil Code which will result in greater conformity to the provisions of the Convention. Both the Convention and the proposed revision to the Civil Code provisions on sales are evidence of a reaction to the need in today's worldwide economy for the unification and harmonization of sales law. Louisiana businesses should not only accept this trend in sales law but embrace it as the benefits to be reaped far outweigh the inconvenience of learning and applying new law.

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100. Farnsworth, *supra* note 12.

