New Taboos on the International Sale of Goods

BY NOEL J. PARA

American businesses engaging in international commercial transactions should take note of a new law: the United Nations Convention on Contracts for the International Sale of Goods. Because of the multinational character of more and more markets, greater export opportunities presented by current exchange rates, and increasing competition in European markets expected in 1992, U.S. executives should address the significant effect the new law will have on their operations and the need for revised sales documentation taking the Convention into account.

Example: A Rome department store places an order for 5,000 pairs of hiking boots with a New England shoe manufacturer whose products are suddenly fashionable among young Italians. The manufacturer's order acknowledgment form substantially conforms to the purchase order, except it contains additional clauses permitting 5 percent over- or under-deliveries, a limitation on the time to register complaints, and a *force majeure* clause. The shoe manufacturer still has a deal, right?

Maybe so under our Uniform Commercial Code (U.C.C.). But, since these changes clearly relate to quantity, liability and dispute resolution and are therefore material under the Convention, the order acknowledgment constitutes a rejection of the Italian order; it is a counteroffer rather than an acceptance. Fickle tastes change and the boots are now passé. The Italian Buyer is free to accept a competing offer from another manufacturer. When the New England company follows up on the sale, it discovers it has lost the order and is left without a claim for damages.

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DON ALMQUIST

Despite such surprising results, the Convention received little initial attention from American lawyers when it became effective in the United States and several other countries in 1988. However, at the time of this writing, it is effective for international sales contracts involving 23 countries, which have adopted and completed the ratification process of the Convention as of March 1, 1991; by March 1, 1992, the number will be 30 (see box, page 34). Consequently, commercial documentation drafted before 1988 and used in international sales is no longer adequate.

The Convention represents the efforts of several international law groups. Despite many foreign drafters, the influence of American legal scholars and the example of our own Uniform Commercial Code resulted in an approach that is in many respects familiar to American lawyers and businesspeople. Nevertheless, the Convention produces a number of results that can have surprising and undesirable consequences for unwary American businesses.

CONVENTION APPLICABILITY

In general, the Convention applies to contracts for the sale of goods between commercial Buyers and Sellers located in different Convention

countries. Transactions concluded by U.S. companies with foreign companies in Convention countries are covered even if the foreign company has a U.S. office, so long as the office is not otherwise involved in the sale. Consumer goods bought for the personal use of the Buyer are excluded, as are transactions involving investment securities, negotiable instruments, ships and aircraft. Purely local transactions between businesses in the same country are also excluded, such as the purchase of supplies directly from local vendors by foreign manufacturing facilities owned by U.S. companies.

Example: The Seller is a U.S. manufacturer of high-impact plastics, doing business only in the United States. The Buyer is a French manufacturer of ski goggles doing business only in France. The Convention applies to the parties' sale agreement for lenses.

Example: The Seller is a German manufacturer of electronics components with offices in many countries, including the United States. The Buyer is a U.S. manufacturer of subassemblies for aircraft controls, doing business only in the United States. The Convention applies to sales agreements for parts concluded directly with the Seller's principal office in Germany if its U.S. office is not involved in the transaction.

Example: The Seller is a Swiss manufacturer of bicycle parts with offices in both the United States and Switzerland. The Buyer is a U.S. bicycle manufacturer. If the Buyer deals directly with the Seller's U.S. office, the Convention does *not* apply to the sale, despite both the United States and Switzerland being Convention countries.

Example: The Buyer is a U.S. manufacturer of farm equipment with offices worldwide. The Seller is an Italian manufacturer of rubber goods, also with worldwide offices. The Buyer's Italian facility purchases tractor tires directly from the Seller's local office. The Convention does *not* apply to such purely local procurement activities, despite the fact that both the United States and Italy are Convention countries.

THE BATTLE OF THE FORMS

The Convention makes a significant departure from the U.C.C. in its treatment of the problems of offer and acceptance—"contract formation"—and the problems of discrepancies between the Seller's standard form documents (sales orders and order acknowledgments) and the Buyer's standard forms (purchase orders and order confirmations)—the so-called battle of the forms. The U.C.C. generally favors finding contract formation at the expense of battle of the forms problems that are often difficult to resolve.

The Convention generally adopts a more conservative "mirror-image" rule. It favors certainty as to the exact contents of the contract. Such certainty can be hard to find when parties fire conflicting standard forms at each other and "done deals" turn out to be illusory. The result of this essential Convention-U.C.C. difference is that U.S. businesses cannot persist in playing the battle of the forms game with commercial parties in Convention countries and still expect to secure binding contracts.

The Convention sets forth a classic statement of the mirror-image rule: A purported acceptance containing terms additional to, or different from, those contained in the offer (a "nonconforming acceptance") is deemed to be a rejection of the offer, constitutes a counteroffer, and no contract is concluded. However, if the additional or different terms are nonmaterial, a contract will be formed unless the initial offeror objects to the nonconforming acceptance, in which case, again, no contract is concluded.

Most nonconforming acceptances will automatically be deemed counteroffers; however, since under the Convention all terms relating to price, payment, quality and quantity of goods, place and time of delivery, liability and dispute resolution are deemed to be material.

NONMATERIAL TERMS

Under the U.C.C., a purported acceptance containing nonmaterial additional or different terms generally operates as an effective acceptance and a binding contract exists between the parties. Nonmaterial additional terms would be deemed included if not objected to; generally, any terms different from those in the offer should not be expected to be automatically included.

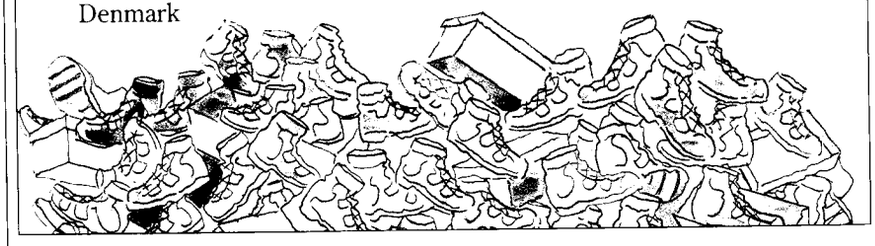
Example: Returning to the hiking boots, if the Buyer were a Chicago department store, the more flexible subjective test of materiality under the U.C.C. would apply. Under the U.C.C. the order acknowledgment would serve as an effective acceptance, and the parties would be bound. As a result of this more flexible test, the nonconforming additional terms would probably be deemed to be routine and immaterial and included in the parties' agreement unless the Buyer expressly objected, and would not result in failure of the contract even if excluded by the Buyer's objection. If the store tried to cancel its order, it would be liable for damages.

The Convention produces even more divergent results from the

MEMBER NATIONS TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

(As of March 1, 1992)

Argentina	Egypt	Italy	Switzerland
Australia	Finland	Lesotho	Syria
Austria	France	Mexico	Ukrainian SSR
Bulgaria	Germany	Netherlands	USA
Byelorussian SSR	Guinea	Norway	USSR
Chile	Hungary	Spain	Yugoslavia
China	Iraq	Sweden	Zambia
Czechoslovakia			
Denmark			



U.C.C. when the additional or different terms are *material*—when the battle of the forms becomes a war. Under the Convention, a purported acceptance containing *material* additional or different terms from the offer always constitutes a counteroffer and never operates to form a contract. Under the U.C.C. (except for tricky conditional acceptances), an acceptance with significantly different terms operates as an effective acceptance but does not include the new terms in the contract.

The effect of the parties' performance under the Convention in the context of this modified mirror-image rule will often result in a dramatically less desirable result for the offeror. Under the Convention, a purported acceptance containing significantly different terms is automatically deemed to be a counteroffer and it places the original offeror in the position of an offeree. Under the Convention the original offeror/counterofferee may express his or her assent by delivering the goods or by paying the purchase price and therefore constructively accepting the counteroffer, including the significantly different terms. This result under the Convention could be disastrous for an American business used to playing the battle of the forms game.

Under the U.C.C., an acceptance containing significantly different terms generally constitutes an effective acceptance, not a counteroffer, assuming the writings exchanged establish a contract. The performance of the original offeror would probably not be deemed to be an acceptance of material new terms, and as a result the contract would be construed with terms more in line with the original offer. Also U.S. courts are less likely to find that performance constitutes assent to materially different terms. They have the benefit of a U.C.C. provision that addresses cases where the parties' conduct evidences an intention to be bound, even though their writings fail to establish a clear offer and acceptance. In such cases, the contract will be deemed to consist of the "lowest common denominator" of consistent terms plus the general provisions of the U.C.C.

Example: The Buyer is a U.S. manufacturer of servo-motors used in robotics. The Seller is a Swedish manufacturer of wire coil assemblies. The Buyer's standard form purchase order for 10,000 coils states that the Seller is liable for all foreseeable consequential damages for failure of the goods to perform according to specifications. The Seller's standard order acknowledgment states that the sole remedy for nonconforming goods is repair or replacement, and that the Seller is not liable for consequential damages. The Buyer initially objects to the Seller's form, but then provides an appropriate letter of credit and the Seller ships the goods. Unfortunately the coils do not perform as warranted and the Buyer is

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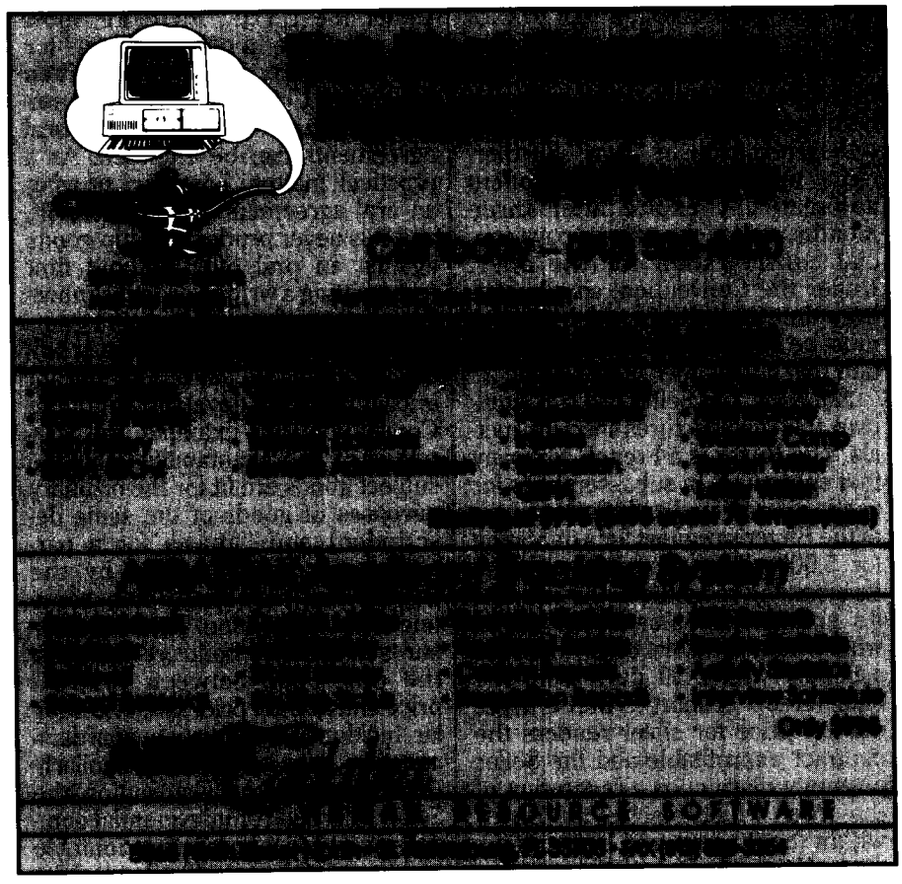

unable to complete his order, resulting in lost profits. Since the Buyer's payment can be deemed an acceptance of the terms of Seller's counteroffer, the limitation on consequential damages is effective and the Buyer's only remedy is repair or replacement.

Example: The Buyer is the same U.S. servo-motor manufacturer. The Seller is another U.S. company. Even without the Buyer's objection to the Seller's acknowledgment, the proposed different term limiting consequential damages is excluded from the contract. The Seller is liable for the Buyer's lost profits.

FIRM OFFERS

In certain industries it is common to make "firm" offers. The Convention rules for firm offers produce unexpected results for unwary American businesses. Under the U.C.C. there is a presumption against firm offers and the offeror must state affirmatively that the offer is being held open before the offer is deemed to be irrevocable or "firm." Furthermore, under the U.C.C., firm offers automatically expire after three months, unless the offeree pays special consideration for the offer. Under the Convention, simply stating a time limit within which an offer must be accepted creates an implication that a firm offer is intended.

Example: The Seller is a U.S. company that manufactures specialty metals. The Buyer is a French company that specializes in subassemblies for use in aircraft applications. Pursuant to the Buyer's request for a quotation for 5,000 silver alloy, low-temperature brazing rods, the Seller submits its completed sales order form, which states, "This offer must be accepted within 30 days from the date hereof." A short-term rise in the market price for silver renders the contract unprofitable and the Seller promptly dispatches a revocation of the order, which reaches the Buyer within the 30 days and before it accepts. Under the Convention, the language in the sales order form constitutes a firm offer and the Buyer can accept the offer despite the attempted revocation. The Seller must deliver the brazing rods at a loss or pay damages.

Example: The Seller is the same U.S. specialty metals manufacturer. The Buyer is another U.S. company. The Seller's revocation of its offer is effective under the U.C.C., no contract is concluded, and the Seller has no liability.

The U.C.C. requires that all contracts with a value of $500 or more be supported by a writing or memorandum sufficient to evidence that a contract for sale has been made. This requirement is typically referred to as a "statute of frauds." Between commercial parties, this requirement may be met by an order confirmation dispatched by one party to which the other does not object. Under the U.C.C., therefore, most oral offers are in effect requests for the other party to submit a written offer. The Convention does not impose a statute of frauds; purely oral agreements can be enforced. As a practical matter, however, proving an oral agreement is quite difficult, and it is never prudent to ship goods against an oral offer without first transmitting a written order acknowledgment.

As already noted, American scholars and the U.C.C. had a significant impact upon the development of the Convention. For example, the warranties of "merchantability" (that the subject goods are fit for the ordinary purposes of goods of the same description) and "fitness for a particular purpose" implied by the U.C.C. are essentially the same under the Convention. The basic measures of ordinary contract damages, the difference between contract price and market price, are also similar. Incidental and consequential damages are generally treated similarly (except under the Convention the Seller may claim consequential damages such as lost profits attributable to loss of volume). Similar results may be reached with respect to passage of risk and title, but the familiar U.C.C. delivery terms, such as f.o.b. and f.a.s., are not incorporated in the Convention. Therefore, careful attention to drafting clear delivery terms is important.

EFFECTS OF CONVENTION

Already mentioned are problems that arise when the parties *do not* expressly agree on the terms of their agreement, or the results supplied by law where there is no contract provision. That was the bad news. Now the good news: Under the Convention, as is generally the case under the U.C.C., the parties to a sales contract are free to agree on any terms they wish or to exclude the application of the Convention altogether, in favor of the law of a particular country or state. Any term that expressly varies the Convention provisions, such as an agreed-upon limitation of remedies otherwise available under the Convention, will be enforceable even if the Convention otherwise applies to the transaction. Furthermore, an agreed-upon choice of law clause that provides for the law of a particular jurisdiction, to the express exclusion of the Convention, will operate to fully exclude its provisions.

The adoption of the Convention by the United States for transactions with parties in other countries adopting the Convention can be a great benefit for U.S. businesses. It provides internationally the same type of level playing field established here by the adoption of the U.C.C. But the frequency with which the Convention provides results different from those expected under the U.C.C. makes it essential for American companies engaged in international commerce to learn the new rules of the game and use them to their advantage. In the meantime, they should attempt to reach firm agreements on applicable sales terms with their international business partners and have their lawyers review their standard terms in light of the Convention. Hopefully the adoption of the Convention by the United States and so many other nations will contribute to increased certainty and mutuality of expectations as international commerce moves to a truly global economy. □

(For reprint and photocopy information, see p. 1.)