INTERNATIONAL SALES LAW AND THE OPEN-PRICE CONTRACT

John HONNOLD *

SUMMARYS A. *The Role of "Offer" and "Aceptance"*; B. *The convention's provisions on definiteness; C. Communications to au unspecified group;* D. *Indications of the goods.* 1. *Specifications,* 2. *Quantly: Requirement and Out put Contracts;* E. *Price,* 1. *Price Terms in Context.* 2. *Interpretation v. Validity: A Preliminary Textual Analysis of Articles 14 and 55,* 3. *Legislative History,* 4. *Articles 14 and 55; the Validity Question; Conclusión.*

For close to three decades I have had the privilege of working with Jorge Barrera Graf on unification of low for international trade, with ever-increasing admiration for his professional and personal qualities. This essay on a topic within the field of our shared endeavor is submitted in grateful homage to this gentle and noble man.

Mexico and the United States of America are now among the countries, in each region of the world, that have adopted the uniform law established by the 1980 Convention on Contracts for the International Sale of Goods.[1] The decades of work, in which Jorge Barrera Graf played a cruical role, has now been crowned with success.[2]

A new law is like a healthy child-its future depends on nurture, including help over rough spots. This essay is devoted to one of the

* Schnader Emeritus Professor of Commercial Law, University of Pennsylvania; Chief, U.N. International Trade Law Branch and Secretary, United Nations Commission on International Law, 1969-1974.

[1] As of May 1988, the Convention (CISG) had been adopted by Argentina, Australia, Austria, China, Egypt, Finland, France, Hungary, Italy, Lesotho, Mexico, Sweden, Syria, United States of America, Yugoslavia and Zambia. Procedures for adoption, by ratification or accession, are nearing completion in additional States.

[2] Barrera Graf was Chairman of the UNCITRAL Working Group on the International Sale of goods which, in nine sessions (1970-1977) prepared the basic draft. The legislative process, and Barrera Graf's role, are described in J. Honnold, DERECHO UNIFORME SOBRE COMPRAVENTAS INTERNATIONALES § 9 (Caracas & Madrid; Edersa: 1987), Spanish language version of UNIFORM LAW FOR INTERNATIONAL SALES (Kluwer, 1982) cited as *JH Commentary*. Barrera Graf generously provided a *Prologo* for the Spanish version - pp. 23-26.

rough spots in the Convention's rules on contract formation —the problem of offers and agreements that do not fix the price.[3]

A. The Role of "Offer" and "Acceptance"

In the Convention, the formation of international sales contracts is addressed in the eleven articles of Part II (Arts. 14-24). Most of these articles are concerned with "offer" and "acceptance": Is a communication from A to B an "offer"? If so, is B's reply an "acceptance"?

Most contracts in international trade are not made by this simple two-communication process. This fact does not challenge the value of framing rules on offer and acceptance. Some transactions do consist of only two relevant communications-one that may or may not be an "offer" and one that may or may not be an "acceptance". In this setting it is necessary to have distinct rules for the two types of communications. For example, there is no time limit for making an "offer" but limits are required for the time of "acceptance" (Arts. 18-21). A second example: An offer under some circumstances may be revoked while an acceptance is binding (Arts. 16, 18(2)).

However, serious problems arise if one assumes that contracts can be made only if they fit a simple two-step formula. For example, a relatively simple single-shipment export sale is normally instituted by exchanges of letters or telexes in which no one communication is an "offer" or "acceptance". Further communications develop descriptions and prices of the goods, expected dates and methods of shipment and methods of payment-normally by the buyer's arrangement for the issuance of a letter of credit and its confirmation by a bank near the seller. In these transactions the contract may not be closed before the letter of credit is issued, and in some instances only when the seller ships the goods and presents the necessary documents (invoice, bill of lading, insurance policy and draft) to the confirming bank.[4] Complex international sales may involve many more preliminary steps that are finalized only by the simultaneous execution of a formal contract. In these transactions a contract is made although it is impossible to isolate an "offer" and "acceptance".

[3] See Barrera Graf, The Vienna Convention on International Sales Contracts and Mexican Law: A Comparative Study, 1 Ariz. J. Int. & Comp. L. 122, 142-143 (1982). See also Barrera Graf, La Convención de Viena, X ANUARIO JURIDICO 141, 152-154 (1983).

[4] See the Prototype Export Transaction in J. Honnold, Sales & Sales Financing 310-339 (5th ed. 1984).

Fortunately the Convention does not compel the stretching or amputation of a living understanding to fit the Procrustean bed of "offer" and "acceptance". Under Article 8(3) a contract may be concluded "by performing an act, such as one relating to the dispatch of the goods or payment". In addition, Article 18(3) gives effect to "understanding" that is derived from "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." In short, the Convention accommodates both the simple exchange of "offer" and "acceptance" and also the development of the understanding that a contract has been formed even though it is impossible to isolate an "offer" or "acceptance".[5]

B. The Convention's Provisions on Definiteness

At the outset, our attention will be centered on the opening article of Part II, Formation of the Contract:

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. 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.
(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

When we reach the problem of open-price contracts we shall also be concerned with the following provision in Part III; Sale of Goods, Chapter III, Obligations of the Buyer:

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price,

[5] Article 23 on the time of completion of the contract rounds out provisions that address problems that arise from claime that an acceptance is too late - e.g., Art. 18 (2). Article 23 does not support the view that no contract can exist if it is impossible to determine "the moment" when it was made.

> 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.

One will note that Article 14 deals with questions of definiteness in the following settings: (1) Communications to an unspecified group ("public offers"); (2) Indications of the goods (specifications and quantity) and (3) The price. Although we shall be concerned primarily with open-price agreements, examining the Convention's handling of the first two questions will help us when we reach the more complex problems presented by price.

C. Communications to an unspecified group

The juridical character of the reference to "specific persons" in the first sentence of Article 14(1) is clear: This provision creates a presumption that a communication that is not addressed to "one or more *specific* persons" does not express an "*intention to be bound* in case of acceptance". There are practical reasons for this presumption. For example, sellers often give wide distribution to catalogues describing a line of goods and indicating prices. Some months may be required for the preparation, printing, and distribution of the catalogues. During this period some of the goods may become unavailable because of heavy demand, shortage of materials, or other production dificulties, and cost increases may call for readjustment of prices. If supply or production difficulties are widespread, or if the general price level rises sharply, the seller may face a flood of orders. If these orders should be "acceptances" of an "offer", the result could be ruin for the seller and a windfall for the buyers. Lawmakers and courts have been reluctant to construe communications to create such hazards.

Does the reference to "specific persons" in Article 14(1) invalidate an attempt to make a binding "public offer"? Article 14(2) makes clear that one may make an offer to as large a group as one wishes: The only requirement is that this intent be "clearly indicated".

D. Indications of the goods

1. *Specifications*

Article 14(1) (second sentence) states: "A proposal is sufficiently *definite* if it *indicates the goods*"... Does a proposal fail to "indicate

the goods" if it states that the buyer will later "specify the form, measurement, or other features of the goods"? This does not make a contract too indefinite: Under Article 65 if the buyer fails to make the specification "the seller may... make the specification himself in accordance with the requirements of the buyer that may be known to him". In short, an "offer" must "indicate" the goods but details may be established in the course of performing the contract.

2. *Quantity: Requirement and Output Contracts*

Under Article 14(1) (second sentence) a proposal is sufficiently definite if *(inter alia)* it "expressly or implicitly fixes or makes provision for determining the *quantity*...". Important contracts often call for the supply of a buyer's requirements or for the delivery of a seller's output. Does the fact that the quantity will not be fixed until the buyer's requirements or the seller's output become known invalidate the parties' attempt to make these contractual arrangements?

Article 14 (quoted in full *supra* at B) addresses the question whether a "proposal" constitutes "an offer". Let us consider whether the quantity provisions, like the "public offer" provisions (Part C, *supra*), yield to the intent "clearly indicated" by the parties.[6]

Example A. B telexed to S, "Can you sell me No. 1 quality nylon thread from your factory at $ 0.50 per yard?" S replied "I accept your offer".

It seems clear that B's communicaton was not "sufficiently definite" since it made no "provision for determining the quantity". This standar, indeed, seems designed to help decide whether B's communication indicated "an intention to be bound in case of acceptance". B's communication was not an "offer" and S's reply did not close a contract.

[6] The crucial decisions bearing on this question were made at the Commission's 1978 review of the Working Group's 1977 draft on Formation of the Contract. As we shall see in more detail at E (3) (a) (c), *infra*, in this review the Commission revised Article 8 of the Working Group draft to produce the language which was submitted to the Diplomatic Conference as Article 12, and which was finalized as Article 14 of the 1980 Convention. A summary of the Commission's 1978 deliberations appears as Annex I to the Commission's Report on its Eleventh Session, IX Yearbook p. 1 at pp. 37-39, paras. 73-108 (herein cited as *1978 Deliberations*).

Example B. S and B executed a "Contract of Sale" which provided for the sale to B for one year of S's output [or B's requirements], of No. 1 Nylon thread, at $ 0.50 per yard.

In Example B the "Contract of Sale" did not "make provision for determining the quantity" except in terms of future output or requirements - quantities unknown and unknowable at the time of executing the "Contract of Sale".

If B had sent S a telex, "Will you sell me the output of your factory [of described goods at a specified price] for one year", the degree of indefiniteness for such an important contract might well lead to the conclusion that B's telex was an inquiry rather than an "offer"; S could not complete a contract by a reply "I accept". However, in Example B, by executing the "Contract of Sale" the parties clearly established their intent to be bound on the terms they set forth in the writing.

Examples A and B suggest the difficulty of concluding that Article 14 provides a single formula that governs both: (a) The question whether a communication should be interpreted as an "offer" that leads to a contract by the reply "I accept" and also (b) The validity of a "Contract of Sale" executed by the parties that clearly shows their intent to be bound.

In UNCITRAL's 1978 review of the Working Group's Formation draft, as we shall see, the issue of validity was raised in connection with offers that did not make provision for the price. However, there was no suggestion that these provisions on "what constitutes an *offer*" invalidates an explicit agreement by the parties for sales in which the quantity is to be measured by the output of the seller's mine or factory or by the buyer's requirements. The Secretariat Commentary on these provisions (then Article 12) in 1978 Draft Convention states that "the means by which the quantity is to be determined is left to the entire discretion of the parties" including provisions such as an offer to buy "all my requirements". Official Records, 1980 Conference, p. 21. Comm. on Art. 12, paras. 11-13.

This lack of concern in the setting of Article 14 for the validity of contracts that fail to fix the precise quantity is significant, for output or requirement contracts that fail to fix quantity guidelines, such as upper and lower limits, are susceptible of abuse by an artificial increase of "output" or decrease of "requirements" when economic conditions slump; comparable temptations for abuse arise during an economic boom. The lack of provision in Article 14 on the effect

of abusive conduct is quite natural, since the danger of abuse is a general problem and calls for remedies that are not confined to the making of the contract. One remedy is the Convention's requirement (Art. 7(1)) calling of interpretation of its provisions "to promote... the observance of good faith in international trade". A second control is available in the rules of contract interpretation of Article 8. Finally, Article 4(a) preserves rules of domestic law invalidating abusive contract applications; these rules are found under various headings *bonne foi, Treu und Glauben* and "unconscionability". For example, the Uniform Commercial Code (USA) 2-302 provides that a court "may refuse to enforce" an unconscionable contract or clause, or "may so limit the application of any unconscionable clause as to avoid any unconscionable result". More specifically, UCC 2-306(1) limits output or requirement contracts to "such actual output or requirements as may occur in good faith".

E. Price

Against this background we turn to this problem: Do the parties have the power to make a binding sales contract that does not "expressly or implicitly" fix or make "provision for determining" the price? As we shall see, the dispute involves both Articles 14 and 55. Considerable ink has been shed debating this issue as to the parties' power to contract. This issue is an inviting one for theoretical dispute but, as we shall see, has little practical significance.

1. *Price Terms in Context*

Commerce, one scarcely needs to say, is an economic activity; price is a vital ingredient of economic success or failure. There is scant need for a rule ol law that tells international traders that they may not make a binding contract that leaves the price wholly at large. Usually the contract will specify the price; long-term contracts may make elaborate provision for adjusting the initial price to take account of changes in cost. Smaller transactions may make no specific reference to price but the least likely possibility is that the parties have no understanding as to how the price will be determined.

A common situation in which the price is not expressly stated but (Art. 14) is "implicitly fixed" may be illustrated as follows:

Example C. Seller has distributed catalogues describing various types of goods and listing prices. Buyer sends Seller an order requesting Seller to ship goods designated by a model number in the catalogue, but does not specify the price.

In the above example buyer's order in response to Seller's catalogue did not close a binding contract. Under the "public offer" provisions of Article 14(1), *supra*, Seller's catalogue (in the absence of clear indication) is not to be construed as an offer but only as an invitation to submit offers. (The catalogue will probably state that the listed prices are subject to change; even in the absence of such a statement the seller retains the power to modify the price since the catalogue did not make a binding offer.)

In response to Buyer's offer, Seller will often accept the Buyer's order by an "order acknowledgement form". Seller's order acknowledgement will normally state the price. If the price is the same as that stated in the catalogue to which Buyer referred in the order a contract will be closed, since Buyer's order would be reasonably understood (Art. 8(2)) as referring to that stated in the catalogue. If Seller's prices have changed Seller may phone or telex Buyer informing it of a modification in the catalogue price and asking for confirmation of the order at the new price. If Buyer confirms the order, the price has then been fixed and the parties are bound by contract.

If Seller's catalogue prices have not changed, Seller may inmediately ship the goods and notify Buyer of the shipment by an invoice that states the catalogue price. Under Article 18(3) Seller, by shipping followed by appropriate notification, accepted Buyer's offer "by performing an act, such as one relating to the dispatch of the goods". A contract has thus been closed by accepting Buyer's offer which (Art. 14(2)) "implicitly fixed" the price as that stated in the catalogue to which Buyer referred in his order.

Let us suppose that Seller has increased its prices above those in the catalogue to which Buyer referred and, because of haste or carelessness, ships without securing Buyer's agreement to the new price. Seller is now at risk. If Buyer accepts the good without knowledge of Seller's price change, the parties are bound by contract at the lower price in Seller's catalogue: Buyer's offer implicitly referred to the catalogue price; Seller's shipment without notification would reasonably be understood by Buyer as accepting Buyer's offer at the catalogue's price (Art. 8(2)). If Seller notified Buyer of the price change before Buyer accepted the goods, Buyer would have the option either

(1) to reject the goods, or (2) to accept the goods at the modified price. If Buyer objects to the higher price, he would normally phone or telex Seller and an agreement would be reached on the price. (Seller may find it difficult to redispose of the goods in Buyer's country and may be amenable to a compromise.)

For reasons suggested above, only rarely will the parties enter into a binding contract without at least (Art. 14(1)) an "implicit" understanding on the price or a means "for determining" the price. Situations that approach the edge involve emergency orders for the manufacture of minor replacement parts or requests to rush a shipment of goods for which the seller has not listed a price. Even here, as the examples suggest, the buyer will seldom accept the goods before he receives an invoice or other notification of the seller's price. If the seller's method of determining a price is not fixed and binding on the buyer by trade usage or by a practice the parties have established (Art. 9), the buyer would not be bound to accept the goods unless he agrees to the price. Hance rarely (if ever) will it be necessary to face the question that has become a center of controversy - does the Convention bar the parties from making a contract that neither "expressly" nor "implicitly fixes or makes provision for determining... the price".

In a complex world full of unpredictable people almost anything can happen. We now turn to this issue which has stirred lively debate and, in truth, does raise intriguing questions of statutory interpretation and legal theory.[7]

2. *Interpretation v. Validity: A Preliminary Textual Analysis of Articles 14 and 55*

The contested issue of theory can be exposed and tested in the setting of the following improbable case.

Example D. Following negotiations, Seller and Buyer signed an agreement which called for Seller to manufacture and ship to Buyer goods of specifications and quantity stated in the agreement. The agreement did not fix a price and instead stated: "We intend to be bound by this agreement, and hereby derogate from any impli-

[7] See P. Schlechtriem, Uniform Sales Law 50-52, 81 (1986); The 1980 Vienna Convention: Lausanne Colloquium (1984): Eorsi at 46-47, Stoffel at 62-63, Tercier at 120-121; Farnsworth, Formation of Contract, § 3.04[1] in International Sales (N. Galston & H. Smit, eds.: Parker School Proceedings, 1984). The views expressed herein will differ from some of the views expressed by the above authors.

cation of Article 14(1) of the 1980 U.N. Convention that we have not made a binding contract in the absence of fixing or otherwise determining the price". Seller manufactured and delivered the goods which Buyer accepted and used. Thereafter, the parties were unable to agree on the price.
Seller seeks to recover for the goods and invokes Article 55 of the Convention:

> 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.

Will Seller's action fail on the ground that there was no contract since the agreement did not "expressly or implicitly fix... or make provision for determining the... price" as required by Article 14?

Buyer's argument has to face, at the outset, the fact that Article 14, read literally, deals with the question whether a "proposal" is "sufficiently definite and indicates an intention to be bound" to be "an *offer*". Here the parties did not exchange an "offer" and "acceptance"; instead they signed a writing that stated that they intended to be bound by contract even though the price had not been fixed. In Example D, to expose the basic issue, the parties expressly stated that they intended to be bound and that they derogated (Art. 6) from any provision of the Convention that would deny effect to that intent. (This intent could also be expressed by executing a contract of sale that did not specify the price.)

As we have seen (at A, *supra*), the Convention recognizes that contracts can be made without following the two-step offer-acceptance pattern: Article 18(3) provides that a contract may be concluded "by performing an act", and Article 8(3) provides that statements (including terms of agreements) are to be interpreted to include trade usages and the parties' practices and also are to be construed in the light of "any subsequent *conduct of the parties*".

In the life of commerce, as in the above example, there is often no question as to whether a communication by one party should be construed as an "offer". Instead, the parties' intent to be bound by contract is made clear by the terms of their agreement or by their conduct under the agreement in delivering and accepting goods.

Does Article 14 deal not only with the question whether a communication should be construed as an "offer" but also with the validity of an executed agreement that does not determine the price? This latter reading of Article 14 is difficult to sustain in the face of Article 4 which states that "except as otherwise *expressly* provided in this Convention, it is *not* concerned with: (a) *the validity of the contract or of any of its provisions...*". Deference to the parties is also shown by Article 6: the parties may "derogate from or vary the effect of *any* of [the Convention's] provisions."[8]

However, we must defer conclusions until after we can examine the legislative background of Articles 14 and 55.

3. *Legislative History*

As we have seen, several distinct and difficult issues are latent in the brief, general provisions of Articles 14 and 55 of the Convention. The legislative history sheds a flickering but useful light on these issues and on their resolution.

The story is complex. We must trace the background of closely related provisions in separate Parts of the Convention Part II on Formation and Part III on Sales. In addition we need to follow the trail through two stages: (a) UNCITRAL (first the Working Group and then full Commission) and (b) The Diplomatic Conference.

a. *Uncitral*

i) *The "Formation" Provisions*

As we have seen, the language that became Article 14 of the Convention was developed at the Commission's 1978 review of Article 8 of the Working Group's 1977 draft on formation of the contract. The Summary of Deliberations in this 1978 review, note 5, *supra*, at paras. 79-93, shows that opinions were sharply divided. Some delegates were of the view that the basic question was whether a communication should be interpreted as expressing an intent to be bound in the event of an acceptance (paras. 83-84, 89). Others implied that the issue was one of validity (paras. 82, 85) and, under one view, the last sen-

[8] The one exception in Article 6 to the principle of freedom of contract involves domestic requirements of form (such as a signed writing) that, under Articles 12 and 96, may be preserved by a reservation.

tence of Article 8(3) of the Working Group draft might be construed as an international rule that would override the domestic law of some jurisdictions (e.g., France) that the validity of a contract depended a provision fixing the price or making provision for its determination (para. 87) [9] - a result that would narrow the scope of the general rule (Art. 4(a) of the Convention, *supra*) that "except as otherwise expressly provided in the Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions...".

The most widely supported criticism of the Working Group draft was the provision in the Working Group's Article 8(3) (last sentence —quoted below) [10] that an offer that did not fix the price would be considered as proposing the "price generally charged by the *seller*". As the Summary of Deliberations reported, "This criticism was largely directed against selecting the price generally charged by the seller. It was considered that such a selection did no take into account the interests of the buyer..." (para. 85) - a matter of special concern "in relation to trade affecting developing countries" (para. 86).

As a result of this debate "it was generally agreed that it was essential to formulate a compromise..." (para. 88). To that end a Working Group of five States was established to prepare a draft that would take account of the deliberations of the Commission. (para. 90). In response to this mandate the Working Group recommended: (a) That paragraph (3) of the draft be deleted and (b) Trat the following second sentence be added at the end of paragraph (1): "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" (para. 91). These modifications produced the language that became Article 14 of the Convention.

The Commission approved this proposal. The only reported comment was a statement by one representative that he supported the

[9] See B. Nicholas, French Law of Contract 109-110 (1982): French Code Civil, Art. 1108, requires that a contract have an *objet;* this requires an obligation to pay a price that is determined or determinable; Barrera Graf, Vienna Convention, *supra* note 3, at 143; Ghestin, Le Contrat 428 (1980).

[10] Article 8(3) of the Working Group draft (last sentence) provided in part: "...if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the conclusion of the contract..." Article 36 of the 1977 UNCITRAL draft on "Sales" (as contracted with "Formation") over opposition, also had pointed to "the price generally charged by the seller...". See VIII Yearbook p. 35 at p. 48, paras. 323-340. As we shall see, this reference is to the seller was deleted at the Diplomatic Conference in framing Article 55.

proposal as a compromise although he was "in principle, opposed to the rule that a proposal was sufficiently definite if it implicitly fixed or implicitly made provision for determining the price" (para. 92).

One will note that the essential elements of this compromise were these:

(1) Deletion of the language that referred to the price charged by the seller.

(2) Deletion of the language that some feared might override domestic rules on invalidity of the contract.

(3) Retention of the language (now Art. 14(1), last sentence) that a proposal that does not state the price may be an offer if it "implicitly fixes or makes provision for determining" the price.

ii) *Unstated Price in the "Sales" Draft: Article 55*

During the period we have been reviewing, the Working Group first prepared a draft Convention on "Sales" (eventually Part III, Articles 25-88 of the Convention) and then prepared the "Formation" draft (eventually Part II, Articles 14-24).

In 1977 the full Commission reviewed the Working Group's "Sales" draft. This draft contained a sharply-contested provision (then Art. 36) that when a contract does not state or make provision for determining the price "the buyer must pay the price generally charged by the *seller* at the time of the conclusion of the contract".[11]

As we have seen, in the 1977 UNCITRAL review of the "Formation" draft a similar reference to the price charged by the seller met strong opposition and was deleted.

In 1978 UNCITRAL combined the "Formation" and "Sales" drafts to produce the 1978 Draft Convention which was submitted to the 1980 Diplomatic Conference. The technical work required in merging the two drafts prevented the revision of the "Sales" provisions to conform with the above 1977 revision of the "Formation" provisions. Consequently, this problem became one of the tasks of the Diplomatic Conference.

[11] UNCITRAL, Report on Tenth Session (1977), VIII Yearbook pp. 48-49, paras. 323-340. The above provision, then Art. 36, became Art. 51 in the 1978 Draft Convention which was submitted to the Diplomatic Conference, and became Art. 55 of the Convention. The full text of Art. 55 was quoted *supra* at B.

b. *The Diplomatic Conference*

Except for final voting in the Plenary, action on Parts I-III of the Convention (Arts. 1-88) was taken in the "First Committee", a body in which all participating States were members. The First Committee met from 10 March to April 7. The Summary Records of the deliberations appear at pp. 236-433 of the Conference's Official Records, (sometimes cited as O.R.).

i) *The "Formation" Draft*

The Diplomatic Conference considered the articles of the 1978 Draft Convention in numerical order. Consequently, the Conference reached the "Formation" provision on unstated price (Art. 12, finally Art. 14) before there was an opportunity to respond to the strong objections to the use of the seller's price in the "Sales" draft (Art. 51, finally Art. 55). In reviewing Article 12 this led to anxiety over the possible interplay between this article and the unresolved issues in Article 51. This anxiety produced a cross-fire of proposals to amend Article 12, all of which were defeated: The prevailing view was to hold to the 1977 UNCITRAL compromise. O.R. pp. 275-277, 292-294, paras. 67-103, 47-76. Consequently, the UNCITRAL compromise, as analysed supra at E(3) (a) (i), remained in force.

ii) *The "Sales" Provision on Unstated Price*

The First Committee did not reach Article 51 of the UNCITRAL draft until March 26-31. Time pressure had developed; deliberations in the First Committee were to be concluded on April 7.

Several amendments to Article 51 were proposed. The most extreme proposed deletion (U.S.S.R. and Byelorussian SSR, O.R. 363). Slightly less extreme was a proposal that listed specified "guidelines" that contracts could set forth for determining the price (France, O.R. 363-364). Others proposed relatively minor adjustments of the UNCITRAL text (O.R. 366).

All of these proposals were defeated or withdrawn and an *ad hoc* working group of ten States was then established to prepare an amended text. The Committee approved the working group's proposal (O.R. 392-393); this language became Article 55 of the Convention, quoted *supra* at B.

Article 55 has two important features:

(1) The opening phrase (closely related to the 1978 UNCITRAL text) states the article's scope. (New wording is underscored followed by the prior text in brackets): "*Where* [if] a contract has been validly concluded but does not expressly or *implicitly* [impliedly] fix or make provision for determining the price...".

(2) The important change made by the working group's proposal deleted the reference in the UNCITRAL draft to "the price generally charged *by the seller*". Instead, following the language quoted in (1), above, Article 55 states: "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".

4. *Articles 14 and 55; the Validity Question*

We may now state a few conclusions that seem free of doubt:

(1) A communication by A to B that does not (under Article 14(1)) "indicate the intention" of A "to be bound in case of acceptance" is not an "offer". "Acceptance" by B is not effective. Article 55, of course, is irrelevant.

(2) A proposal by A to B (under Article 14(1)) is "sufficiently definite" if it "expressly or implicitly fixes or makes provision for determining the quantity and the price." If A's proposal also indicates the "intention to be bound". A's proposal is an "offer" and B's acceptance is effective. Article 55, again, is irrelevant.

The above situations in which Article 55 has *no* role to play lead to this crucial question: What role *does* Article 55 play? The following alternative views need to be considered:

Alternative A. Article 55 applies when a Contracting State exercises the option permitted by Article 92 not to be bound by Part II of the Convention (Art. 14-24). (This option was requested by the Scandinavian States.)

Alternative A rests on the premise that Article 14 lays down a rule of *validity* that outlaws agreements that do not (Art. 14(1)) "expressly or immplicitly fix or make provision for determining ... the price", even though the parties execute a formal agreement clearly expressing their intent to be bound. Presumably, under this approach open-price contracts are invalid (see Example D at E(2), *supra*) even though the parties expressly seek to exercise the right under Article 6

to "derogate from or vary the effect of *any of* [the Convention's] provisions."

As we have seen, reading Article 14 as a rule of validity of contracts is subject to a series of serious textual difficulties: (1) Article 14 is drafted in terms of the definition of an "offer" rather than the validity of the contract; (2) Article 4 states that "except as otherwise *expressly* provided in this Convention, it is not concerned with (a) the validity of the contract..."; (3) Article 6 provides that "The parties may ... derogate from or vary the effect of *any* of its provisions. In addition, Alternative A denies substantial effect to Article 55. As has been noted, few States have indicated interest in excluding Part II. Moreover, the Scandinavian States, who requested the option to exclude Part II, did not indicate that Article 14 laid down a rule of validity or indicate that Article 55 was needed for their special benefit. Indeed, it is not plausible to suppose that States who exclude Part II because of their preference for their domestic rules on Formation would feel the need for Article 55 to supplement their own rules in this area.[12]

What meaning may be given to the opening phrase of Article 55: "Where a contract has been *validly* concluded..."? As we have seen (*supra* at E(3) (a) (i)), the representative of France was concerned that the last sentence of Article 8(3) of the Working Group formation draft migh overrule a rule of French law that invalidated agreements that did not state or make provision for determining the price. The offending language was deleted from the draft that became Article 14 but similar language was used in the compromise provision, developed at the Diplomatic Conference, that became Article 55 (see E(3) (b) (ii), *supra*). Records were not kept of the discussions of the working group that framed this compromise provision. However, it seems plausible to suppose that the special language requiring that the contract be "validly concluded" was needed to mee the special concern that the Convention not override the domestic rule of validity in French law.[13]

[12] The Swedish Act of 1915 on the Conclusion of Contracts imposes no restrictions relating to price. The Swedish Act of 1905 on the Purchase and Exchange of Goods states (Art. 5): "Where a contract of purchase has been concluded without the price having been fixed, the buyer must pay what the seller demands unless it is deemed unreasonable."

[13] The above discussion does not mean to suggest that an international sale governed by the Convention would be invalid for failure to state the price under French or any similar legal system-particularly in view of the revision of Article 55

We now turn to the second alternative reading of Article 55.

Alternative B. Under a second view, Alternative 55 would also play a role in States (the vast majority) that adopt both Parts II and III of the Convention when parties show their intent to be bound but do not under Article 14(1) "expressly or implicitly fix or make provision for determining" the price. Under this interpretation, a communication from A to B which fails to meet the above-quoted standard of definiteness in Article 14(1) would not bind A to a contract by B's acceptance, unless the parties have clearly shown their intent to be bound by other language in their communications, or (under Article 8(3)) by "practices which the parties have established between themselves, usages [or their] subsequent conduct...". This result is similar to the approach that Article 14 articulates for proposals that are not addressed to "specific persons" (e.g. published advertisements): such proposals are not to be considered as "offers" unless "the contrary is clearly indicated by the person making the proposal".

Conclusión

This essay has been concerned with perhaps the most difficult part of the Convention. To help those who will work on future projects to prepare uniform international rules, me should try to find the sources of this difficulty.

One who closely follows the discussions of this problem in UNCITRAL and at the Vienna Conference is impressed by persistent ambiguity and misunderstanding. The language that became Article 14 of the Convention, from the outset, was framed in terms of whether a communication "constitutes an offer". Many of the delegates discussed the issue in these terms, while others felt that the issue posed by this language was whether the parties had the power to make a

to delete the reference to the price charged by the *seller*. See note 10, *supra* and the action at the Diplomatic Conference at E(3) (b), *supra*.

Those concerned with the question of validity under domestic law may need to address these questions: (1) An international sales agreement, following the language of Article 55, states that the price is that "*generally* charged at time of the conclusion of the contract for such goods...": Is this contract invalid under domestic law? (2) If not, is the result different when the applicable law (Article 55 of the Convention) supplies the missing term? (3) Did the domestic rule that required agreement on the price grow out of (or was preserved by) a danger of abuse for which the legal system had (or has) no remedy? For example, did (does) domestic law include a provision like Article 55? (4) Are the parties to an international sales contract (aided by Article 55), in a different situation than the parties to domestic transactions for whom the rule of invalidity was designed or preserved?

valid agreement (even by executing a formal document entitiled "Contract of Sale") when the agreement did not fix (or make provision for fixing) the price.

There is little indication in the discussions that this divergence in premises resulted from differences in commercial experience or in value choices.[14] Instead the problem seemed to reflect different patterns of thought derived from concepts of domestic law. In one legal universe it is thought that a contract of sale, in the nature of things, must provide for the price; in another legal universe the possibilities of contracting are conceived more broadly.

In the decade of work that led to the 1980 Vienna Conference, delegates of the various persuasions - common and civil law, market and planned economies - quickly learned that they coud not achieve the success they all desired if they thought of their task as GATT-like bargaining: we'll take more of your watches if you'll take more of our chickens. Instead, the UNCITRAL delegates quickly concluded that the premises for decision were these: What rules would be the most fair, practical and appropriate for international trade?

The legislative records do not suggest that in discussing open-price contracts the delegates reverted to legal protectionism or nationalism. The difficulty lay in basic differences in ingrained mind-sets, and in a failure to recognize that this was the core of the problem.

What can be done to avoid this difficulty in future work on international unification? One measure, unhappily, takes time: sufficient exposure in law study to other legal systems so that one will not readily assume that one's domestic categories and concepts are in the nature of things, *semper, ubique et ab omnibus*.[15]

In the meantime, is it possible to organize legislative work to focus attention on practical problems instead of legal doctrine? Can one think of a song without words, or law-making that shuns domestic legal concepts? The possibility and the power of this approach were demonstrated by pioneers in comparative law who framed concrete factual examples and directed attention to what legal systems *do* when

[14] The one issue of policy resulted from the early draft that if no price was fixed or implied the buyer must pay the price generally charged by the *seller*. This issue was separate from the basic issue of the power of the parties to contract, and was solved by referring to the price "generally charged" for such goods. See E(3) (b) (ii) *supra*.

[15] This writer has apologized elsewhere for the confusion that resulted from his inadequate background in Roman law in the Commission's review of the 1964 ULIS provisions on reduction of the price. JH Commentary § 313 note 5.

faced with these *facts*.[16] A variation on this approach has been employed at difficult points in UNCITRAL law-making.[17] Here the goal is not research but realistic decision-making. A diverse legislative body that is invited to discuss what *result* in concrete situation is fair and practical is more likely to come to agreement that when the discussion is directed towards competing legal concepts. Moreover, a series of well-chosen factual examples can expose contours of the problem that lie buried in the general concepts of domestic law.

[16] See R. Schlesinger et al., Formation of Contract, A Study of The Common Core of Legal Systems (Dobbs Ferry, N.Y.: Oceana, 1968).

[17] See, *e.g.*, Report of the Secretary-General (A/CN.9/87, Annex IV), V UNCITRAL Yearbook p. 80 at pp. 83, 88, 90, 93-94, paras. 19-21, 52-58, 71, 95-105.