POTENTIAL EFFECTS OF THE INTERNATIONAL SALES CONVENTION ON U.S. CRUDE OIL TRADERS

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I. INTRODUCTION

Lawyers who give advice concerning international sales of goods will have to become acquainted with the U.N. Convention on Contracts for the International Sale of Goods[1] (Convention) by the time it comes into force. The Convention was adopted in Vienna on April 11, 1980, and will come into force twelve months after the tenth state either ratifies or accedes to it.[2] By September 1986, eight states, Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, and Zambia, had ratified or acceded to the Convention.[3] Three of these states, France, Egypt, and Syria, are linked by the common tradition of the French civil law system, a fact that reflects the apparent attractiveness of the Convention's civil law drafting style to such states.

President Reagan submitted the Convention to the United States Senate for consent to ratification on September 21, 1983.[4] The President's submission followed the April 1981 recommendation in favor of ratification by the House of Delegates of the American Bar Association.[5] On October 9, 1986, the Senate gave its advice and consent to ratification by unanimous vote,[6] making the United States the ninth state to approve

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1. *United Nations Convention on Contracts for the International Sale of Goods*, U.N. GAOR Annex I, U.N. Doc. A/CONF 9/18 (1980) [hereinafter *Int'l Sales Convention*], *reprinted in* U.N. Doc. A/CONF 97/19, U.N. Sales No. E.82V.5 (1981); 19 INT'L LEGAL MATERIALS 668 (1980); *see also* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 469 (1982).

2. *Int'l Sales Convention*, *supra* note 1, pt. IV, art. 99.

3. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL at 349, U.N. Doc. ST/LEG/SER. E/4, U.N. Sales No. E.86.V.3 (1985). The ratification by Zambia occurred on June 6, 1986, according to the U.N. Treaties section in New York.

4. *Message from the President of the United States Transmitting the United Nations Convention on Contracts for the International Sale of Goods*, 98th Cong., 1st Sess. 98-99 (1983) [hereinafter *Message from the President*].

5. *Report to the House of Delegates*, 1981 A.B.A. SEC. INT'L L. REP. [hereinafter A.B.A. REP.].

6. 132 CONG. REC. S15767-74 (daily ed. Oct. 9, 1986). The vote was 98–0.

the Convention. With only one more state's ratification or accession required, the Convention will most likely come into force by late 1987 or early 1988.

Given the fact that international sales create unique legal problems, it is not surprising that a treaty has been developed specifically for international sales. The Convention has been reviewed favorably by several commentators in terms of its adaptability to current business practices.[7] Other commentators, however, have not viewed the Convention so favorably.[8]

The purpose of this article is to compare some of the Convention's 101 Articles with the Uniform Commercial Code (UCC) in order to reveal some of the effects the Convention may have on U.S. crude oil traders who are involved in international sales. The use of telex exchanges, as described in Part II below, to conclude contracts for international sales of crude oil has created a demand for legal uniformity that the Convention is designed to meet. What follows is a brief description of international crude oil trading and a review of the Convention's applicability and interpretation. Choice of law issues, the Convention's rules for formation of contracts, and rights and obligations of the parties are compared to the UCC. In addition, this article discusses some of the problems that U.S. traders who negotiate international sales of crude oil may encounter under the Convention.

II. BACKGROUND

Crude oil trading has developed into a commodity-oriented industry in which speculation and the law of supply and demand have become the dominant factors. International sales of crude oil occur most frequently through the spot market, which operates as a free market that is based on the contracts of the crude oil producers. The traders from private trading companies and oil companies communicate daily by telephone to negotiate the terms of crude oil sales for near term delivery. The volume of crude oil being traded on the spot market versus all internationally traded crude oil increased from one percent in 1974 to forty percent in

7. *See, e.g.*, Winship, *Formation of International Sales Contracts under the 1980 Vienna Convention*, 17 INT'L LAW. 1-18 (1983). (The Convention "and U.S. law resolve many problems in the same way and the relatively few differences will not be significant in practice."); *Symposium on International Sale of Goods Convention*, 18 INT'L LAW. 3 (1984).

8. *See* Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984); Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445 (1984). ("The very circumstances that demand a higher level of legal harmonization precludes isolating international transactions and subjecting them to different rules than those that govern domestic agreements.")

1984.[9] A large portion of the balance of the volume was dedicated to the contract market, in which producers offer long term contracts to their customers; however, the volatility of prices since 1984 has restricted the contract market's use.

Spot market speculation has been most famous in the North Sea where a single cargo of Brent crude oil was traded forty-six times.[10] Such a series of sales is called a daisy chain and has added an element of complexity to transactions that is peculiar to the crude oil trading industry. The daisy chain has been defined as a "line of sellers and buyers of a single cargo of oil, traded on a forward basis on the expectation of making profit on short-term price movements."[11] If the cargo being traded has not actually been acquired when the contracts are negotiated, these so-called dry barrels are "sold on the understanding that if some future buyer actually wants crude to process in a refinery, then the oil can be obtained."[12]

Forward trading (currently agreeing to buy or sell a cargo at a specific price to be delivered in the future) produces a situation in which the contract of sale is subject to a myriad of problems among many companies of different nationalities and different legal systems. The confusion created by this situation cries out for resolution by a body of uniform rules for international sales such as are contained in the Convention.

U.S. crude oil traders are faced with a wide variety of choices each time they negotiate a sale of crude oil on the spot market. Such spot market deals consist of a telephone agreement to sell or buy plus a confirming telex setting forth the details of the transaction. The crude oil trading industry has been revolutionized by what has become known as the international telex contract, the usual mode of contract formation for spot sales of crude oil.[13]

Once agreement is reached on the fundamental provisions for price, quantity, quality, and delivery, the crude oil traders must come to grips with a multitude of legal-oriented options. Due to the complexity of these options, each of the producing multinational oil companies and national oil companies have developed a set of their own General Terms and Conditions to cover everything from payment to dispute resolution. These General Terms and Conditions are incorporated by reference in

9. Povey, *The North Sea Market "Undermining" OPEC*, Fin. Times, Nov. 26, 1984, at 15, col. 1.

10. Dafter, *Traders in Crude Find the Market More Speculative*, Hous. Chronicle, Feb. 21, 1983, § 2, at 2, col. 1.

11. Povey, *supra* note 9, at col. 3.

12. Dafter, *supra* note 10, at col. 3.

13. For a discussion of crude oil trading, see generally Brubaker, *Oil Traders Are Over Legal Barrel*, HOUS. BUS. J., Mar. 12, 1984, at 8A. For a review of the legal issues involved, see generally Becker, *International Telex Contracts*, 17 J. WORLD TRADE L. 106 (1983).

the seller's confirming telex and are subject to the buyer's review, modification, or approval.

One of the major problems that occurs as a result of this mode of contract formation is that the buyer's telex reply may contain materially different terms and conditions. The crude oil trader will attempt to resolve these differences during the course of negotiations, but if final agreement is not reached, problems may arise concerning the time and place that the contract takes effect as well as choice of law.

The Convention provides that an acceptance is effective when it reaches the offeror.[14] Since no internationally uniform rule for telex acceptances exists, it appears that contract formation problems will not be capable of resolution until the Convention comes into force.[15] This point is further developed in the contract formation section below.

III. APPLICABILITY

The Convention will apply to an international transaction only if the seller and buyer have their "places of business . . . in different States,"[16] and if both of the states are contracting states,[17] that is, have ratified or acceded to the Convention. Several types of sales are expressly excluded from the Convention's coverage, such as consumer sales, sales of stock, shares, negotiable instruments, and ship sales.[18] Neither does the Convention apply to contracts for labor or services[19] nor to the liability of the

14. *Int'l Sales Convention, supra* note 1, pt. II, art. 18(2).

15. Becker, *International Telex Contracts*, 17 J. WORLD TRADE L. 106, 114 (1983).

16. *Int'l Sales Convention, supra* note 1, pt. I, ch. I, art. 1(1).

17. *Id.* pt. I. ch. I, art. 1(1)(a). Under Article 1(1)b, however, the Convention would also apply "when the rules of private international law lead to the application of the law of a Contracting State." This provision introduces the uncertainties of private international law that the authors of the Convention attempted to avoid. Article 95 permits a State to declare that it will not be bound by Article 1(1)b. The A.B.A. recommended "that the United States avoid the uncertainties which Article 1(1)b would introduce by making the reservation permitted by Article 95." A.B.A. REP., *supra* note 5, at 5. The U.S. Senate added the following reservation to its advice and consent to ratification of the Convention: "Pursuant to Article 95 the United States will not be bound by subparagraphs (1)(b) [sic] of Article 1." 132 CONG. REC. S15768 (daily ed. Oct. 9, 1986) (statement of Sen. Lugar).

18. *Id.* pt. I, ch. I, art. 2. Specifically, the following types of sales are outside the Convention's scope:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

19. *Id.* pt. I, ch. II, art. 3(2). "This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

seller for death or personal injury caused by the goods.[20] By excluding sales to consumers and actions for death or personal injury, the Convention provides a foundation to "strongly support freedom of contract."[21]

Parties to a contract may opt-out of the Convention completely by expressly excluding its application[22] if it would otherwise govern. This further enhances the parties' freedom of contract. Thus, the parties to an international sale of crude oil could avoid the Convention completely by expressly stating that it is not applicable to their agreement. Alternatively, the parties could generally "vary the effect"[23] of the provisions of the Convention to fit their needs. U.S. traders may find it difficult to opt-out or vary the effect of the Convention, however, when dealing with national oil companies of the developing world, which may insist that the Convention govern the entire contract.

In terms of the issues to which it applies, the Convention governs only the formation of the contract and the rights and obligations of the seller and the buyer arising from an international sales contract.[24] The Convention is not concerned with either the validity of a contract or the effect that a contract may have on the property interests in the goods sold.[25] Questions of whether the sale to the buyer cuts off outstanding property interests of third persons are not addressed. This approach is more limited in comparison with the UCC's detailed and broad coverage of commercial transactions, although the Convention "covers substantially the same ground as Article 2 of the UCC."[26] Such limited coverage appears to be a realistic approach when viewed in terms of the probable worldwide applicability of the Convention.

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20. *Id.* pt. I, ch. II, art. 5. "This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person."

21. Honnold, *The Uniform Law of International Sales and the UCC: a Comparison*, 18 INT'L LAW. 21, 23 (1984). Professor Honnold, in referring to the UCC's prohibitions against unconscionable contracts and restrictions on disclaimers of warranties states, "In contrast, the international sales law imposes no restrictions on freedom of contract."

22. *Int'l Sales Convention*, *supra* note 1, pt. I, ch. I, art. 6. "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."

23. *Id.*

24. *Id.* pt. I, ch. I, art. 4.

> 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. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
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> (a) the validity of the contract or any of its provisions or of any usage;
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> (b) the effect which the contract may have on the property in the goods sold.

Id.

25. *Id.*

26. Honnold, *supra* note 21, at 24.

IV. INTERPRETATION

The Convention provides that in its interpretation "regard is to be had to its international character and to the need to promote uniformity in its application. . . ."[27] The reference to uniformity nearly parallels the UCC which provides that the "underlying purposes and policies of this Act are . . . to make uniform the law among the various jurisdictions."[28] One is reminded, however, of the theories of civil law jurisdictions in which courts are not bound by previous judicial interpretations, even those of higher courts.[29] This may cause a continuing lack of uniformity in opinions rendered construing the Convention and, therefore, make it more difficult to render legal advice concerning the probable outcome of disputes. Conversely, once the fundamental provisions of the Convention are widely used, the number of complex contractual drafting choices facing a crude oil trader's lawyer should be decreased, thus permitting more uniformity in the basic provisions of crude oil producers' General Terms and Conditions.

Supplementary rules are expressly provided for in the UCC as follows: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."[30] The Convention similarly provides that matters governed by but "not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."[31] Thus, the Convention provides for a potentially similar outcome to that of the UCC, assuming that the common law would be applicable.

A good faith requirement is not directly imposed by the Convention. Rather, it provides that in its interpretation there shall be regard for promoting "the observance of good faith in international trade."[32] This is much more limited than the UCC's requirement that "every contract or duty within this Act imposes a duty of good faith in its performance or endorsement."[33] This is not to say, however, that such an approach to good faith under the Convention is likely to prove to be deficient. Good

27. *Int'l Sales Convention, supra* note 1, pt. I, ch. II, art. 7(1).

28. U.C.C. § 1-102(2)(c) (1977).

29. A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 1135 (2d ed. 1977). "French theory considers the judge bound by the provisions of the written law. It refuses any binding effect to previous judicial interpretations, even one emanating from a hierarchically superior court."

30. U.C.C. § 1-103(1) (1977).

31. *Int'l Sales Convention, supra* note 1, pt. I, ch. II, art. 7(2).

32. *Id.* pt. I, ch. II, art. 7(1).

33. U.C.C. § 1-203(1)(b) (1977).

faith is uniformly expected of international trading partners, especially crude oil traders.

Provisions in the Convention concerning practices of the parties and usages of trade are similar to the UCC. The Convention states that the parties are bound by the "practices which they have established between themselves,"[34] whereas the UCC gives contractual effect to the "course of dealing between parties."[35] The Convention makes usages of trade an implied part of the contract if the parties knew or should have known of their use in international trade.[36] The UCC also gives contractual effect to a "usage of trade."[37] Thus, as with the UCC, "the provisions of the Convention yield to the expectations of the parties, whether derived from express contract terms, from their established practices or from applicable trade usages."[38] As a consequence, U.S. crude oil traders' transactions should not be adversely affected by the application of the Convention.

V. CHOICE OF LAW

There is an apparent void in the Convention in the area of choice of law rules. In an attempt to fill this void, the Hague Conference on Private International Law has adopted a draft Convention on the Law Applicable to Contracts for the International Sale of Goods[39] (Applicable Law Convention). One of the main purposes of the Applicable Law Convention is to provide a set of choice of law rules to complement the substantive rules of the Convention.[40] Although the Applicable Law Convention is intended to be compatible with the Convention, its choice of law rules may be adopted regardless of the Convention.[41]

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34. *Int'l Sales Convention, supra* note 1, pt. I, ch. II, art. 9(1). "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

35. U.C.C. § 1-205(3) (1977). "A course of dealing between the parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."

36. *Int'l Sales Convention, supra* note 1, pt. I, ch. II, art. 9(2).

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

37. U.C.C. § 1-205 (1977), *supra* note 35.

38. *Message from the President, supra* note 4, at 5.

39. *Final Act of the Hague Conference on Private International Law, Extraordinary Session, Diplomatic Conference on the Law Applicable to Contracts for the International Sale of Goods* [hereinafter *Applicable Law Convention*], *reprinted in* 24 INT'L LEGAL MATERIALS, at 1575 (1985).

40. 24 INT'L LEGAL MATERIALS 1573 (1985). The Applicable Law Convention is also specifically intended to replace the Hague Convention on the Law Applicable to International Sale of Goods of June 15, 1955.

41. *Id.* at 1577. The Applicable Law Convention expressly provides in article 23(a) that it

The Applicable Law Convention expressly sets forth the general rule that parties are free to choose the law governing their contract. Furthermore, this choice may be limited to specific portions of the contract.[42] In addition, the parties may agree to change the applicable law after the execution of the contract without prejudicing its validity.[43] There are also express provisions for circumstances under which the Applicable Law Convention may not be used to determine the applicable law[44] and for those circumstances under which the Applicable Law Convention is appropriate.[45]

If the parties fail to choose the law applicable to their contract, the Applicable Law Convention would provide for the contract to be "governed by the law of the State where the seller has his place of business at the time of conclusion of the contract."[46] There are, however, several enumerated circumstances under which the contract would be governed by the law of the state of the buyer's place of business at the conclusion

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"does not prejudice the application—a) of the United Nations Convention on contracts for the international sale of goods. . . ."

42. *Applicable Law Convention, supra* note 39, art. 7(1).

> A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.

43. *Id.* art. 7(2).

> The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties.

44. *Id.* art. 5. Those areas that the Applicable Law Convention would not determine are:

(a) the capacity of the parties or the consequences of nullity or invalidity of the contract. . .;
(b) the question of whether an agent is able to bind a principal. . .;
(c) the transfer of ownership. . .;
(d) the effect of the sale in respect of any person other than the parties;
(e) agreements on arbitration or on choice of court, even if such an agreement is embodied in the contract of sale.

45. *Id.* art. 12. The Applicable Law Convention would apply to the following areas:

(a) interpretation of the contract;
(b) the rights and obligations of the parties and performance of the contract;
(c) the time at which the buyer becomes entitled to the products, fruits and income deriving from the goods;
(d) the time from which the buyer bears the risk with respect to the goods;
(e) the validity and effect as between the parties of clauses reserving title to the goods;
(f) the consequences of non-performance of the contract. . .;
(g) the various ways of extinguishing obligations, as well as prescription and limitation of actions;
(h) the consequences of nullity and validity of the contract.

46. *Id.* art. 8(1).

of the contract.[47] For purposes of clarification, the Applicable Law Convention confronts the issue of multiple places of business of a party by providing that the "relevant place of business is that which has the closest relationship to the contract and its performance. . . ."[48] This provision would eliminate jurisdictional disputes which might otherwise arise under Article 8 of the Applicable Law Convention if a party has more than one place of business. The meaning of the law of a given state is that which is in force "other than its choice of law rules."[49]

Thus, the Applicable Law Convention would reaffirm the freedom of parties to choose the governing law of their contract, while simultaneously providing a set of choice of law rules with which to supplement the Convention. Whatever form eventually given the Applicable Law Convention, it should serve a useful purpose in cases in which the parties to an international sale of crude oil either fail to choose or are unable to agree on a governing law.

VI. FORMATION

The Convention's provisions on the formation of contracts are written in the civil law style[50] of a complete collection of brief, general rules as opposed to the more detailed provisions of the UCC. In its scope, the Convention omits matters that the lawyer schooled in the UCC would expect to find. Two examples of such omissions are: (1) there is no provision for consideration;[51] and, (2) there is no requirement that a contract of sale be in writing.[52] The omissions, however, would rarely

47. *Id.* art. 8(2). Such circumstances are as follows:

(a) negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or
(b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or
(c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).

48. *Id.* art. 14(1).

49. *Id.* art. 15.

50. The civil law drafting style of brief, general rules is well illustrated by the Civil Code of France, Title 6 of Sale, arts. 1582 and 1583.

> Art. 1582. Sale is an agreement through which one party is obligated to deliver an object and the other to pay for it. It can be made by an authenticated instrument or by an instrument under private signature. Art. 1583. The sale is complete between the parties, and property passes by operation of law to the buyer, as against the seller, as soon as there is agreement on the object and the price even though delivery has not yet been made or the price paid.

51. Winship, *Formation of International Sales Contracts under the 1980 Vienna Convention*, 17 INT'L LAW. 1, 4 (1983).

52. *Int'l Sales Convention*, *supra* note 1, pt. I, ch. II, art. 11. But see Honnold, *The New Uniform Law for International Sales and the UCC: a Comparison*, 18 INT'L LAW. 21, 26 (1984) for an explanation of the history of the statute of frauds issue; also see articles 12 and 96 of the Convention, which provide for a reservation preserving the statute of frauds.

present a problem to the crude oil trader since he deals in barrels, dollars, and the telex machine. Even with these shortcomings in style and scope, commentators have concluded that the Convention's provisions "constitute a comprehensive codification which provides many of the same answers found in the common law and the Uniform Commercial Code."[53]

In the writer's experience, the crude oil trader's technique of making telex offers and acceptances sometimes becomes intertwined with public relations efforts. Confirmation of the receipt of an acceptance is sometimes requested by the offeree, and certain clauses are partially repeated in successive telexes, thus making it appear that the party is uncertain whether it is making an offer or accepting one. Such an occasional lack of definiteness would not be tolerated under the Convention's provisions on formation of contract.

These provisions on the formation of contracts contain carefully negotiated compromises between the civil law and the common law concepts, with several important concessions to the common law. The Convention does not follow the civil law presumption that offers are irrevocable, but it does incorporate the common law presumption of irrevocability with a firm offer exception similar to that contained in UCC § 2–205.[54] The Convention rejects the common law mailbox rule by providing that a contract is concluded when an acceptance reaches the offeror,[55] but it also provides that an offeror may not revoke an offer once an acceptance is dispatched.[56] This is significant to U.S. crude oil traders because it reflects the current practice of entering into contracts while assuming the acceptance does not materially alter the offer.

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53. Winship, *supra* note 51, at 5.

54. A.B.A. REP., *supra* note 5, at 7. The Int'l Sales Convention, art. 16(2), provides

> (2) However, an offer cannot be revoked:
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> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
>
> (b) 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.

Under the UCC, the rule on firm offers is as follows:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time stated for a reasonable time, but in no event may such period of irrevocability exceed three months. . . .

U.C.C. § 2-205 (1977).

55. *Int'l Sales Convention, supra* note 1, pt. II, art. 18(2). The "mailbox rule" prevails in the United States through the landmark decision in Adams v. Lindsell, 106 Eng. Rep. 250 (K.B. 1818), which held that once an acceptance letter is placed in a mailbox by the offeree it is a binding acceptance, and the offeror's power to revoke is terminated.

56. *Id.* pt. II, art. 16(2) provides that an offer cannot be revoked

> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
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> (b) 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.

The Convention tends to emphasize the need for definiteness in an offer, which means that an open price offer would probably not be effective.[57] In the "battle of the forms" context, the "application of the Convention will lead to fewer enforceable contracts because the terms of an acceptance must conform to those of the offer except where alterations are *not* material."[58] As an example, suppose a seller of crude oil sends a telex acceptance of a buyer's telex offer, incorporating by reference its General Terms and Conditions. The seller then sends the buyer its printed General Terms and Conditions which contain an indemnity clause concerning third party claims arising under the contract. The buyer receives the printed General Terms and Conditions, but makes no objection. Has a contract been formed? If so, is the indemnity clause part of the contract?

Under the Convention, a contract has not been formed because the indemnity clause qualifies as a material alteration relating to one party's liability to the other. Other terms such as those relating to price, payment, quality, quantity, delivery, and arbitration are also considered to materially alter the terms of an offer.[59] The seller's acceptance amounted to a counteroffer, and the buyer's silence was not an acceptance of the counteroffer, because the Convention provides that "silence or inactivity does not in itself amount to [an] acceptance."[60]

Under the UCC, an additional term in the acceptance becomes part of the contract between merchants unless it materially alters the offer.[61] Although it may be subject to some debate, it appears that a term providing for indemnification would be material. Thus, although a contract would be formed under the UCC, the indemnity clause would probably not be part of it.

This example demonstrates that one of the probable effects of the Convention would be the enforcement of fewer contracts than would be the case under the UCC. In response to this probability, the American Bar Association (ABA) has taken the position that "in international

57. *Id.* pt. II, art. 14(1).

58. A.B.A. REP., *supra* note 5, at 7 (emphasis added). *See also* Vergne, *The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 AM. J. COMP. L. 233 (1985). The term "battle of the forms" is defined as a term used to describe the effect of a "multitude of forms used by buyers and sellers to accept and confirm terms expressed in other forms." BLACKS LAW DICTIONARY 139 (5th ed. 1979).

59. *Int'l Sales Convention*, *supra* note 1, pt. II, art. 19(3). "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."

60. *Id.* pt. II, art. 18(1).

61. U.C.C. § 2-207(2)(b) (1977). "(2) The additional forms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: . . . (b) they materially alter it. . . ."

trade where the parties are dealing with each other at a distance, the Convention's greater conceptualism is desirable because it will force parties to produce more evidence of a concluded agreement."[62] Perhaps, therefore, the Convention will usher in an era of greater certainty to the process of concluding agreements for international spot sales of crude oil.

VII. OBLIGATIONS

The obligations placed on the seller and buyer under the Convention are substantially similar to those imposed on U.S. crude oil traders by the UCC. It is the uniformity that could be gained throughout the industry by the application and use of the Convention that makes the provisions of the Convention discussed below so significant.

A seller's obligation to deliver goods or documents under the Convention is generally the same as a seller's obligations under the UCC.[63] The Convention's rules on the conformity of goods to the contract are also similar in content to the UCC. For example, a seller is permitted to cure a nonconforming tender,[64] and a buyer must inspect delivered goods promptly and must give notice of nonconformity within at least two years from delivery.[65] A seller also warrants title of the goods sold and

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62. A.B.A. REP., *supra* note 5, at 7.

63. *See, Int'l Sales Convention, supra* note 1, pt. III, ch. II, § 1 arts. 31-34; U.C.C. §§ 2-503 & 2-504 (1977).

64. *Int'l Sales Convention, supra* note 1, pt. III, ch. II, § 2, art. 37, which states:

> If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

U.C.C. § 2-508 (1977) provides:

> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may reasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

65. *Int'l Sales Convention, supra* note 1, pt. III, ch. II, § 2, arts. 38(1), 39(2) provide:

> Article 38(1) The buyer must examine the goods or cause them to be examined, within as short a period as practicable in the circumstances.
>
> Article 39(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

U.C.C. § 2-513 (1977) provides:

> (1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any

warrants that the goods are free from claims based on industrial property rights.[66]

When nonconforming goods are delivered, the Convention permits a buyer to reduce the price.[67] According to the ABA, the reduction of price remedy "has origins in the civil law but its formula has been amended so much that it resembles the common law right to deduct damages from the price (UCC § 2-717)."[68]

One area in which the civil law concept won out over the common law is that of specific performance. A negotiated compromise resulted in a provision which would only require common law courts "to order specific performance when they would do so in similar cases governed by domestic law."[69] The international crude oil trader's lawyer could limit the effect of this provision by advising the trader to insist upon a choice of forum in a common law jurisdiction. The remedy of specific performance could also be excluded by expressly prohibiting it in a clause of the telex contract.

Reducing damages is an important matter for crude oil traders to keep in mind, although it is common practice to immediately attempt to

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reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

66. *Int'l Sales Convention, supra* note 1, pt. III, ch. II, § 2, arts. 41 and 42(1) provide:

> Article 41 The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right of claim.
> Article 42(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware. . . .

67. *Id.* pt. III, ch. II, § 3, art. 50, which provides:

> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

68. A.B.A. REP., *supra* note 5, at 10. U.C.C. § 2-717 (1977) provides, "The buyer on notifying the seller of his intention to do so may deduct all or part of the damages resulting from any breach of the contract from any part of the price still due under the same contract."

69. *Int'l Sales Convention, supra* note 1, pt. III, ch. I, art. 28, which provides: "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention." Specific performance remedies are provided for the buyer and the seller elsewhere in the Convention: Article 46(1) provides, "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement;" and Article 62 provides, "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."

In contrast, the common law style of more limited rights of specific performance is demonstrated in the UCC regarding the buyer's right to specific performance: "(1) Specific performance may be decreed where the goods are unique or in other proper circumstances. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages or other relief as the court may deem just."
U.C.C. § 2-716(1), (2) (1977).

cover when the other party fails to perform. It is probable that a provision in the Convention on mitigation will be interpreted to require the nonbreaching party to attempt to enter into a substitute transaction before seeking specific performance.[70] If the nonbreaching party fails to take reasonable measures to enter into a substitute transaction to mitigate the loss, the breaching party "may claim a reduction in the damages in the amount by which the loss should have been mitigated."[71]

The buyer's right to reject the goods under the Convention is more limited than under the UCC. This provision is potentially advantageous to a crude oil trader who is a net seller, because the seller is protected from unethical or underhanded practices if the buyer cannot reject the crude oil for nonfundamental defects.[72]

The buyer's principle obligation under the Convention is, of course, to pay for the goods.[73] The buyer's obligation to take delivery is consistent with the UCC as well.[74] Under the Convention, a buyer's remedies for breach by the seller parallel the seller's remedies for the buyer's breach, except, of course, for conformity of the goods.[75]

Anticipatory breach was a sensitive issue for the negotiators at the Vienna conference, but the Convention permits a party to suspend performance if "it becomes apparent that the other party will not perform a substantial part of his obligations. . . ."[76] The result is similar to that reached under UCC § 2-610.[77]

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70. *Int'l Sales Convention, supra* note 1, pt. III, ch. V, § 2, art. 77, which provides:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

71. *Id.*

72. A.B.A. REP., *supra* note 5, at 10.

73. *Int'l Sales Convention, supra* note 1, pt. III, ch. III, § 1, art. 54, which provides: "The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made."

74. *Id.* pt. III, ch. III, § 2, art. 60, which provides: "The buyer's obligation to take delivery consists: (a) in doing all acts which could reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods." Under the U.C.C. § 2-301 (1977), the obligations of the buyer and seller are stated generally: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."

75. *See Int'l Sales Convention, supra* note 1, arts. 45-52, 61-65. For example, article 61(3) on buyer's remedies provides: "No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract." Article 45(3) on remedies of the seller contains the same wording except for the references to buyer and seller.

76. *Id.* pt. III, ch. V, § 1, art. 71(1).

77. U.C.C. § 2-610 (1977) provides:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

The damages provisions of the Convention conform with the basic limits of the common law, providing compensation for foreseeable expectation damages to the nonbreaching party.[78] The formulae for damages are market contract price and cover contract price differentials as is the case under the UCC.[79]

Commercial impracticability under the Convention exempts a party from liability for failure to perform obligations if "the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or have avoided or overcome it" at a later time.[80] The rule resembles the provisions excusing performance because of failure of presupposed conditions in the UCC.[81] "The effect of avoidance [of the contract] is to relieve both parties from their obligations . . ., subject to the payment of damages. The parties must make restitution unless specifically excused. The result is similar to what would occur

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(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach. . .; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

78. *Int'l Sales Convention, supra* note 1, pt. III, ch. V, § 2, art. 74, which provides:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

79. *Id.* pt. III, ch. V, § 2, art. 75, which states:

> If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Under U.C.C. § 2-706(1) (1977), the seller's damages for resale are calculated as follows:

> Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed . . . but less expenses saved in consequence of the buyer's breach.

The buyer's damages for procurement of substitute goods is set forth in U.C.C. § 2-712(2) (1977):

> The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with the incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

80. *Int'l Sales Convention, supra* note 1, pt. III, ch. V, § 4, art. 79(1).

81. The relevant portions of U.C.C. § 2-615 (1977) are: "(a) Delay in delivery or nondelivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . ."

upon 'cancellation' under the Uniform Commercial Code."[82]

VIII. CONCLUSION

Although there are some notable differences between the Convention and the UCC, "it is true that the 1980 Sales Convention bears a much closer resemblance to the UCC than to any other legal system."[83] The Convention represents a compromise between the civil law and the common law concepts. When faced with the choice of entering into a contract governed by a developing state's law, a civil law jurisdiction or the Convention, the Convention would appear to be the clear choice of any lawyer schooled in the UCC.

Nevertheless, as a result of the combination of the civil and common law concepts discussed in this article, not all cases will be resolved in the same way under the Convention and the UCC.[84] "The probable effect of the Convention will be to enforce somewhat fewer 'agreements' than would be enforced under domestic law."[85] This is not an entirely negative result for international crude oil traders since many such agreements turn out to be bargains that should not have been struck due to changing market conditions.

For the reasons noted above, the provisions of the Convention appear to be compatible with U.S. interests. Many problems encountered under the Convention and the UCC are capable of resolution in substantially the same way.[86] For instance, a problem with an omitted term may be resolved by reference to the Convention's provisions on course of dealing and usage of trade.

The Convention may prove to be a practical mechanism by which U.S. international crude oil traders can avoid being bound by the laws of a developing country. In addition, if a dispute over the formation of a contract governed by the Convention arises, an international crude oil trader's lawyer will not have to face the inherent problems and costs involved in researching and proving foreign law in domestic or foreign courts.[87] If the Convention's strict provisions on formation give rise to more certainty in concluding international spot sales of crude oil, much progress will have been made in the area of international telex contracts.

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82. A.B.A. REP., *supra* note 5, at 12.
83. Honnold, *Uniform Law for International Trade—Progress and Prospects*, 20 INT'L LAW. 635, 639 (1986), (citing Lansing & Hauserman, *A Comparison of the U.C.C. to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N. C. J. INT'L L. & COM. REG. 63-80 (1980)).
84. Winship, *supra* note 51, at 14.
85. *Id.*
86. *Id.*
87. *Id.*