# COMMENT ON AN ASSESSMENT OF THE VIENNA SALES CONVENTION

**By R. Anderson***

The Australian Trade Commission (AUSTRADE) exists to facilitate trade and investment between Australia and foreign countries. Accordingly it provides a comprehensive international business facilitation service and as part of that service will be called upon to give preliminary advice to Australian exporters on matters covered by the Vienna Sales Convention. As the Convention itself provides that contracts to which it pertains will be governed by the Convention unless excluded, Australian exporters will need to be advised as to the effect of the Convention to form a view on the desirability of excluding the Convention or not. AUSTRADE welcomes the Convention and considers that in general it will provide Australian exporters with additional benefits and remedies under their international contractual arrangements. The focus in the Convention on arbitration and speedy resolution of contract disputes is particularly welcome.

## WHAT SHOULD AUSTRALIAN BUSINESS KNOW ABOUT THE CONVENTION?

In advising Australian business on the Vienna Sales Convention, the first question is whether the contract to be entered into is between parties whose places of business are in different states and, if so, whether those states are Vienna Sales Convention contracting states or if the law of a contracting state is to be applied to the contract. The second question is whether the Australian firm should seek to exclude the application of the Convention in whole or in part. Of course, as Professor Pryles notes, these questions will not always arise as there are a number of areas such as consumer sales, auction sales and sales of ships and aircraft which are expressly excluded from the application of the Convention. The exclusion of auction sales may mean that a significant portion of Australia's export trade will not automatically be subject to the provisions of the Convention. Further, the Convention may or may not apply to countertrade. Some clarification in this area would be particularly desirable as this is an area with great potential for growth, especially in the resources area.

The primary aim of Australian exporters will of course be to 'do the deal'. There are many important issues to be addressed in business negotiations. Factors such as price, quality, quantity, time and place of delivery, who will pay for and be responsible for shipping and insurance and a myriad other details are the main concerns of traders. Generally these factors will take precedence over such matters as what will be the governing law of the contract. The law which governs the contract will generally only be of any real importance to traders when something goes

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wrong. In the vast majority of cases, the transaction between an Australian exporter and a foreign customer will go relatively smoothly and proceed as was intended by the parties. A prudent exporter, or perhaps one who has had his fingers burned may well wish to make provision for a deal possibly going bad thereby necessitating involvement in some sort of legal dispute. A business executive seeking an improved position or seeking to forestall potential litigation may consider that having the contract governed by the law of Australia will be an advantage. In such cases the governing law of the contract may intentionally be that of Australia.

Another important and not inconsiderable reason why the Convention may govern a particular contract is default. While it is undoubtedly true that many contracts are formed through a process of negotiation or through victory in the so-called 'Battle of the Forms', contracts are also concluded without reference to any written terms often without thought about specific terms. Living as we are in the age of instantaneous communications, ruled by the tyranny of the fax machine and the telephone, and with the capability of shipping goods vast distances in extremely short periods of time, the modern business executive is often not in a position to negotiate transactions but must respond quickly and effectively in order to fill orders, satisfy customers and maintain a reputation as an effective supplier. In such cases, hesitating to clarify the finer details of the contract may turn out to be a slow form of commercial suicide. In these cases the Convention will provide a valuable framework on which to hang the bargain between the parties.

If, through design or accident, the governing law of the contract is one which applies the Convention the consideration whether or not it is desired that the Convention apply becomes appropriate. To discuss the Convention one must place it in the proper context. While complex explanations of the history of a particular piece of legislation and the various possible interpretations of a particular phrase may be important and interesting to the legal practitioner, they are not within the realm of day-to-day business. Business executives are generally not lawyers. They hire lawyers for the same reasons that they will hire other professionals or even for the reason that they would hire a plumber: lawyers are skilled in an area where the business executive is not. They can explain how the law works and help business deal with legal problems. What does business require from the system of law? It would seem that there are two significant requirements of business from the system of law: the first, certainty and the second, flexibility.

In advising the Australian business executive as to the benefits of the Vienna Sales Convention, it will be important to emphasise how the Convention addresses these concerns.

**Certainty**

One of the objectives of the Convention is to provide an understandable system by which the parties can conduct their business. The Convention has been adopted by a number of Australia's major trading partners and, as it is law in those countries, business persons with whom the Australian firm is dealing (if familiar with the workings of the Con-

vention) can at least be assured that the law of Australia is not just similar, but identical to their own. As an international convention is involved the business person may be further reassured that, barring denunciation by the Australian government, the law will remain the same.

The down side of this situation is that a considerable number of countries have not yet ratified the Convention and it is not easy for the business executive, or indeed the legal practitioner, to find out which countries have ratified the Convention and which have not, not to mention which countries may have made a declaration that they will not be bound by some of the provisions of the Convention. With things as they now are, business may prefer to rely on tried and hopefully proven methods of conducting business, which at least provide the comfort of familiarity.

The Convention provides a set of rules as to whether the contract has been concluded. With the exception of those countries which have made a declaration under Article 92 that they will not be bound by Part II of the Convention, there are now standard and reasonably uncomplicated provisions as to whether in fact a contract has been formed. These provisions are amongst the clearest and easiest to understand of any in the Convention and so it is relatively easy for a body such as AUSTRADE to advise on a few simple rules rather than on complex legal doctrines.

The Convention provides guidance on the rights to avoid the contract.[1] These provisions are somewhat less than clear to the lay reader. The concept of 'fundamental breach' is not one that is readily explainable to the non-legal practitioner.

The provisions[2] which require the party in possession to preserve the goods, is a helpful and logical method of confronting this particular problem. These provisions are, again, very well written and quite easy to understand. This very important question of preservation of goods may well be vital in many disputes.

The Convention also provides for reasonable time periods in respect of claims for non-conformity of goods or third party claims on the goods.[3] Although here, as in a number of other places, the use of the word 'reasonable' is an unfortunately vague but undoubtedly necessary concession for legalism.

One unfortunate omission from the Convention and one that is of great importance to business is the lack of any reference to when property passes as a result of the sale of goods. While, as Pryles states, the concept of passing of property is an Anglo-Saxon one, the non-recognition of this problem could cause difficulties in the interpretation of the Convention. It can often be vital, especially in the event of a dispute, to determine who in fact owns the goods. This is far from clear and AUSTRADE would not be in a position to advise business on this point but would refer them to legal advisers. The Convention, however, usefully defines risk as dependent upon who has control over the goods and this helps clarify the situation.

1 Arts. 49, 64, 82.
2 Arts. 85–88.
3 Arts. 39, 43.

**Flexibility**

The Convention, in a laudable effort to facilitate international trade, allows a wide scope for the application of commercial rather than legal doctrines. This is exemplified by Article 9(1) which provides that 'the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves' and Article 9(2) which incorporates the terms found in particular types of international trade. There is little doubt that many industries develop their own jargon. The drafters of the Convention have wisely recognised this fact and not attempted to fetter the traditional practices of international traders.

For business this is a much more significant aspect of the Convention. There is an almost universal desire to avoid having to resort to litigation in the case of commercial disputes. This desire is felt nowhere more than in the sphere of international trade where a dispute may have to be resolved in a court thousands of miles away, with proceedings conducted in a foreign language, under a law that is in no way similar to our own. While there are methods for resolving disputes between parties in different countries, the Convention provides the much more sensible alternative of resolving these disputes before the need for intervention by a third party arises. The Convention provides a number of useful mechanisms by which disputes may be settled between the parties. They include encouraging practices that may be quite common in commercial arrangements, but do not sit comfortably with the principles of contract law, such as requiring performance by the other side and fixing an additional period for performance of the other party's obligations. Article 50, which allows the buyer to reduce the price paid if the goods do not conform to the contract, is a very convenient way of solving a common problem.

Some other extremely valuable provisions are those under which the buyer may require the delivery of substitute goods in some cases[4] and those which confer a right on the seller to 'cure' its own defects in performance. Article 37 could be of particular utility in cases where the seller has substantially performed one side of the bargain and would like to be in the position to remedy minor defects. Article 38, which governs the examinations of goods, is another particularly useful provision in that it allows for goods to be re-directed and inspection deferred.

The Convention also brings into the contract principles of anticipatory breach and *force majeure* in simplified terms. The right to bring the contract to an end if it is apparent that the other party is not going to be able to perform may be of great benefit. In particular, the provision with regard to a deficiency in the other party's credit-worthiness is quite useful in these times of economic uncertainty. Article 79, which allows a party to escape liability for non-performance due to events beyond that party's control, is a quite reasonable provision that many in business might have occasion to be grateful for.

Finally, if all else fails and the dispute cannot be resolved, the Convention provides guidance as to the assessment of damages and the

4 Art. 46 (2).

effect of the contract being avoided. While these provisions do not, and are certainly not able to, deal with the complex question of quantification, they do provide a level of guidance which may well be quite helpful in confining the scale of litigation.

## CONCLUSION

It is likely that there will be two main occasions when AUSTRADE will be called upon to advise exporters with regard to the law of the sale of goods. When the exporter is seeking to begin trading overseas or to sell in a new market overseas, and when some international contract dispute arises. In the first case AUSTRADE would be able to advise in general terms on how contracts should be properly concluded. At the very least, the Vienna Sales Convention will make easy the answer to the question 'What is the law of this country as regards the sale of goods?' This will become much more relevant as more and more countries ratify the Convention. In the second case, a dispute arising out of a contract that is subject to the Convention will be much more amenable to a prompt resolution than one which is subject to law not understood by one of the parties.

It is clear that once it achieves general acceptance the Convention will be a very valuable tool in facilitating the processes of international trade, an objective that is primary to AUSTRADE's very existence.

In the preparation of this commentary I have drawn on comment from Mr Michael George of Mallisons Stephen Jaques, Sydney and on AUSTRADE-EFIC. Any errors, however, are my own.