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"Exclusion and Validity under the United Nations Sales Convention on Contracts for the International Sale of Goods"

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Exclusion and Validity under the United Nations Sales Convention on Contracts for the International Sale of Goods

The United Nations Convention on Contracts for the International Sale of Goods[1] has been part of New Zealand law for almost a year now; and while many have welcomed it as a step towards business efficacy and harmonisation of international law, few commentaries in New Zealand and indeed in the world have done anything more than provide a simple gloss on what the Convention involves. This is partly due to the lack of case law.[2] Only now are practitioners and academics beginning to explore some of the more specific problems the Convention may have, if they are aware of the Convention at all. The Convention was meant to be a *lex mercatoria*: a law specially drafted to meet the needs of international traders. Does it live up to its promise?

This paper will attempt to explore the area of exclusion and validity under the Convention using standard contractual terms commonly aimed at limiting the liability of one of the parties to a contract. This involves looking not simply at the exclusion of the Convention itself, but of specific articles of the Convention; and what implications and effects exclusion of any sort might have. More specifically, what are the effects of such clauses attempting to exclude liability where there is some corresponding article in the Convention which might have a contradictory purpose? Are such problems rectifiable?

Part I. Exclusion of the Convention

Article 6 provides:

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[1] Hereinafter called simply "the Convention."

[2] As of January 1, 1996, there have been one hundred and forty-two cases regarding the Convention reported. Quoted in L Del Duca and P Del Duca "Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)" (1996) 29 Uniform Commercial Code Law Journal 99, 103.

> "The parties may exclude the application of this Convention or, subject to article 12,[3] derogate from or vary any of its provisions."

To exclude the Convention, parties to a contract dealing with the international sale of goods can simply add a disclaimer specifying that the Convention is not to apply. The wording of the disclaimer, however, should be precise to avoid any ambiguity. It is not enough to specify that "the domestic law of New Zealand will govern the operation of this contract," because although it could mean "New Zealand law, *excluding* the Convention on Contracts for the Sale of Goods, shall govern this contract," it could just as easily mean "New Zealand law, *including* the Convention, shall govern this contract." In one case already, in which a party claimed that contractual reference to German law as the governing law of the contract impliedly excluded the application of the Convention, a German court found that a clause specifying the law of a contracting state will not constitute opting out under article 6.[4]

Parties to a contract are therefore advised then to specify that "the United Nations Convention on Contracts for the International Sale of Goods will not apply to this contract." Furthermore, the parties should also specify a relevant domestic law to govern the contract in the event of the Convention not applying. The possibility of the Convention not applying is a distinct possibility which should be taken into account when drafting any contract dealing with the international sale of goods.

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[3] Article 12 was inserted at the insistence of certain countries whose legal systems required that a contract, or any changes to it, be made in writing.
Article 12 provides:

> Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

[4] (Parties not reported), 7 U 3758/94 Feb. 8, 1995 (Germany, Oberlandesgericht Munchen) UNILEX, quoted in L Del Duca and P Del Duca "Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)" (1996) 29 Uniform Commercial Code Law Journal 99, 111.

On the whole, though, explicit exclusion of the Convention should offer little trouble. More difficult is the situation where there is no explicit exclusion: it may be that the presence of some clause or clauses imply the exclusion of the Convention, or of certain articles of the Convention. From the wording of article 6, it is not clear whether the Convention can be displaced by mere implication. Some commentators have suggested that article 6 does not allow implied exclusion.[5] The Convention's predecessor, the Uniform Law for the International Sale of Goods (ULIS), allowed for "express or implied" exclusion of the ULIS,[6] yet the current Convention itself is silent on this point, suggesting that only express exclusion is permissible. Moreover, the drafters of the Convention were apparently worried that providing for implied exclusion in the Convention might "encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded."[7] That the courts might so act was, and is, a legitimate worry. One of the main aims of the drafters' was that the Convention be a lex mercatoria, a universally applied law: it needed to gain currency and legitimacy in national courts and in the international business community.

Most commentators have said, however, that the Convention does allow for exclusion by implication.[8] First, they argue that silence on this point in article 6 suggests that if the drafters had wanted to allow only express exclusion, they could have said "the parties may *expressly* exclude the application of this Convention" to make this clear. Secondly, the Draft Commentary does not rule out implied exclusion; it only records that the drafters were worried that courts might be quick to interpret an agreement and exclude the

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[5] I Dore and J DeFranco "A Comparison of the Non-Substantive Provisions of the UNICITRAL Convention on the International Sale of Goods and the Uniform Commercial Code" (1982) 23 Harvard International Law Journal.

[6] Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107, reprinted in 13 (1964) Am Journal of Comparative Law 472.

[7] Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, U.N. Doc. A/CONF.97/5, reprinted in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc A/CONF.97/19, at 15.

[8] See for example: C Bianca and M Bonell (eds) *Commentary on the International Sales Law: The 1980 Vienna Convention* (Giuffre, Milan, 1987) 55-56; B Richards " Contracts for the International Sale of Goods: Applicability of the United Nations Convention" (1983) 69 Iowa Law Review; H Stahl "Standard Business Conditions in Germany under the Vienna Convention" (1993) 15 Comparative Law Yearbook of International Business 381.

Convention on insufficient grounds. It is not evidence that the Convention cannot be excluded by implication. The Commentary should be but one factor in determining whether or not the Convention should be excluded by implication in any one fact situation. At best, it is a warning to courts to be cautious in interpreting a contract so as to exclude to the Convention by inference. Thirdly, the legislative history of the Convention suggests that implied exclusion of the Convention is acceptable. During discussions on the Convention's draft, a number of representatives called for the insertion of a requirement that exclusion of the Convention could only be done explicitly. Their proposal was rejected: it was said that "it may be perfectly clear that the parties do not wish the Convention to apply even though this intention was not stated expressly."[9] The Committee considering the proposal made no further changes to article 6. Thus, the possibility of implied exclusion was not ruled out.

Whether or not the Convention is impliedly excluded in any one particular fact situation by inconsistent provisions within the contract in question will probably depend on a number of factors: the most important amongst these being the intentions of the parties, the wording and content of the contract and its clauses, policy and the Convention itself.

Galston and Smit have suggested that where there is no explicit exclusion of the Convention, courts can look to other clauses within the contract in question which might help ascertain the intentions of the parties.[10] Furthermore, any ambiguities can be solved by applying article 9 and in particular, article 8.[11] Article 8 can be used to determine what

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[9] Report of the United Nations Commission on International Trade Law on the Work of its Tenth Session, 32 U.N. GAOR Supp. (No. 17), U.N. Doc A/32/17 (1977), reprinted in [1977] 8 Y.B. UNICITRAL 11, 29, U.N. Doc A/CN.9/SER.A/1977.

[10] N Galston and H Smit (eds) *International Sales: The United Nations Convention on Contracts for the Sale of Goods* (Matthew Bender, New York, 1984) 34-35.

[11] Article 8 provides:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

the parties intended; or where that is not possible, what reasonable persons in the parties' situation would have intended. Article 9 can also be used to determine the parties' intent. The parties to the contract may have had a long history of having had their contracts governed by a particular domestic law. Similarly, the trade in which the parties operate might commonly have contracts or particular terms governed by a particular domestic law. Such facts may be considerations in deciding that the Convention is to be excluded.

However, there may be complications with this approach.[12]

Policy, or adherence to the principles of the Convention, will also play a role. Where parties have actually had negotiations on a particular clause, it should be given effect to, not simply because it has been brought to the attention of both parties, and because both parties have given consent to it, but also because one of the general principles of the Convention is the autonomy and freedom of the parties to choose their own terms. Conversely, where there has been no negotiation, no thought or consent given, and the result of giving effect to the clause is detrimental to a weaker party, it may be that courts will not exclude the Convention, not only because of the absence of intent and consent, but because of the opposing principle arising from the Convention of the need to observe good faith in international trade. Such a principle can be seen in article 7, which provides:

> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and subsequent conduct of the parties.

Article 9 provides:

> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their 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.

[12] For example, where there are acknowledgement and/or merger clauses in the contract. Such clauses might operate to stop articles 8 and 9 being applied. See part II of this paper.

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are 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 of the law applicable by virtue of the rules of private international law.

Article 7 of the Convention specifically limits the application of good faith to the *interpretation* of the Convention Whether or not there is a *general* obligation of good faith in the Convention, however, is still hotly debated by commentators.[13]. The legislative history supports the narrow interpretation of good faith. There was a proposal at one point to insert a provision in the draft Convention which provided that parties would be under an obligation to "observe the principles of fair dealing and act in good faith" in the course of the formation of the contract.[14] Such a duty was argued by some to be unnecessary; others thought it would create uncertainty in the law; still others thought it should not be included unless the Convention provided remedies for breach of the duty. The proposal was not accepted.

A number of academics, though, point out that many of the Convention's articles require either good faith and/or reasonableness; and that from this there may be implied a general obligation of good faith.[15] Others suggest that there is no difference between interpreting the Convention and interpreting the contact governed by the Convention.[16] At least two

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[13] For a number of differing views on Article 7, see P Winship "Commentary on Professor Kastely's *Rhetorical Analysis*" (1988) 8 Northwestern Journal of International Law and Business 623, 631-635; F Enderlein and D Maskow *International Sales Law* (Oceana Publications, New York, 1992) 53-55; J Honnold *Uniform Law for International Sales Under the 1980 United Nations Convention* (2 ed, Kluwer, Deventer/Boston, 1989); and S Zodgekar *Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (LLM Thesis, VUW, 1990) 46-47,52-54.

[14] *Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, para 70, U.N. Doc A/CN.9/142 (1977), reprinted in 9 (1978) Yearbook of the United Nations Commission on International Trade Law, 61, 66, U.N. Doc A/CN.1/SER.A/1978.

[15] C Bianca and M Bonell (eds) *Commentary on the International Sales Law: The 1980 Vienna Convention* (Giuffre, Milan, 1987) 85.

[16] G Eorsi "General Provisions" in N Galston and H Smit (eds) *International Sales: The United Nations Convention on Contracts for the Sale of Goods* (Matthew Bender, New York, 1984) 2-6.

commentators have expressed their belief that the role of good faith in relation to contracts governed by the Convention will become increasingly important; and that such a general obligation will eventually be accepted even by the courts.[17]

Whether or not there is such a general duty, there is still a question of what constitutes "good faith," and how it should be used to interpret the Convention, and/or the conduct of the parties. Bianca and Bonell have pointed to the entire phrase in which the principle is given: article 7 requires "the observance of good faith in *international trade*" (emphasis mine). They also point to the Convention's "international character." They argue that when interpreting and applying the concept of good faith in the Convention definitions of good faith in domestic law should not be taken into account. However, they also suggest that where national standards are accepted at a comparative or international level, regard may be given to them.[18] Whether this is feasible or not, given the fluctuating opinions of different jurisdictions towards the concept of good faith,[19] remains to be seen. Any definition of good faith which were obtained by an analysis of differing jurisdictions' conceptions of good faith might be questionable. It would be difficult to find objective criteria on which to decide the most important elements of good faith, and whose jurisdictions' views should be given the most weight. On the other hand, *all* cases

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[17] P Winship "Commentary on Professor Kastely's *Rhetorical Analysis*" (1988) 8 Northwestern Journal of International Law and Business 623, 635; F Enderlein and D Maskow *International Sales Law* (Oceana Publications, New York, 1992) 54-55.
Can article 7 itself and/or the general obligation of "good faith" be excluded from the Convention? Noticeably, in the relatively new UNIDROIT principles of international contracts, there is a provision (article 1.7(2)) which provides that "the parties may not exclude or limit [the duty to act in accordance with good faith and fair dealing in international trade]." See M Bonell *An International Restatement of Contract Law* (Transnational Juris Publications, Inc, New York, 1994). There is no equivalent provision in the Convention, which suggests that article 7 can be excluded. The question is perhaps only academic, for in practice such a disclaimer would be probably seized upon and objected to, if not deleted. However, in a recent article, it has been argued (albeit in regards to the duty of good faith in common law) that such an exclusion may not be just a theoretical question - lawyers coming from common law countries may see the existence of such an obligation as adding uncertainty to the law, and may wish to exclude it to more clearly define the scope of their obligations. See S Waddams "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 Journal of Contract Law 55.

[18] See n 15, 86-87.

[19] L Nottage "Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Development in the Law of Unfair Contracts" (1996) 26 VUWLR. 247; also S Waddams "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 Journal of Contract Law 55.

involving the international sale of goods are governed by *some* domestic law. It may be equally difficult to extract those elements of good faith which aren't in some way influenced by domestic law conceptions of what good faith is.

Enderlein suggests that observance of the principle of good faith "means to display such conduct as is normal among businessmen [sic]. Hence, no exaggerated demands can be made, and [the] observance of good faith does in no way necessarily include the establishment of material justice between the contracting parties."[20] However, this definition of good faith may follow from the view that good faith is to play a role only in the interpretation of the Convention. Moreover, exactly what conduct is "normal" amongst those doing business is not specified. Zodgekar suggests differently.[21] Citing the preamble to the Draft Convention, he argues that article 7 requires that the provisions of the Convention be interpreted and applied so that the observance of good faith in international trade is promoted. This may mean taking into account the varying levels of sophistication between the parties, the different social, economic and cultural backgrounds, and the disparities in bargaining power that may exist between the parties; and further, that to promote the observance of good faith in international trade requires a higher standard of conduct, perhaps than in domestic law.

Bianca and Bonell point out that another question arises in regards to the implied and express exclusion of the Convention or any of its provisions: is the exclusion valid?[22] The clause or clauses which will operate to exclude the Convention may be the result of (for example) duress, unconscionability, fraud, mistake, or misrepresentation. If this is so, it may be that article 4 determines their operation.

Article 4 provides:

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[20] F Enderlein and D Maskow *International Sales Law* (Oceana Publications, New York, 1992) 56-57.
[21] S Zodgekar *Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (LLM Thesis, VUW, 1990) 52-53.
[22] See above n18, 59-60.

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract. In particular, 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 or of any usage;
> (b) the effect which the contract may have on the property in the goods sold.

Nowhere in the Convention is "validity" defined. Commentators are divided as to the meaning of "validity." Should domestic law determine whether there is a question of validity? Longobardi argues that where domestic law has specific requirements regarding the validity (or enforceability) of the contract and/or any of its clauses, the domestic law should apply and the Convention be excluded.[23] She argues that, in the absence of any definition of validity within the Convention, one should look to article 7, which is meant to help interpret the Convention and settle questions governing it; and in particular, to article 7(2), which says that matters governed by the Convention but not expressly settled within it are to be dealt with applying the general principles on which the Convention is based. Failing this, questions not expressly settled are to be settled in conformity with the law applicable by virtue of the rules of private international law. Since validity is *not* a matter governed by the Convention, it is therefore meant to be dealt with by domestic law. Moreover, Longobardi argues that the legislative history "demonstrates that the Convention's international character require deference to mandatory national laws founded on public policy principles."[24] By excluding matters of validity from the Convention, the drafters were giving recognition to the point that some domestic law "exists solely for public benefit - to prevent the occurrence of any event those legislatures deem to be improper."[25] A contractual provision is invalid, then, if to give effect to it would be contrary to the domestic law's public policy.

Longobardi's approach may be criticised on a number of grounds: surely there are *some* general principles which can be ascertained from the Convention, such as the implied

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[23] L Longobardi "Disclaimers of Implied Warranties: the 1980 United Nations Convention on Contracts for the International Sale of Goods" (1985) 53 Fordham Law Review 863.
[24] See n23, 875.
[25] See n23, 876.

obligation of good faith, or the similar notion of fairness or reasonableness in trade. It might be argued, too, that the public policy argument is too wide. What legal doctrine is based solely on public policy? Conversely, what legal doctrine is not based, in the end, on public policy? Surely the problem is not that such doctrines exist only in particular jurisdictions, but the *extent* to which such doctrines can be used by courts to strike down what they consider to be unfair contracts and contractual terms.

Such a wide view of validity may stifle the possibilities of the Convention. A danger is that in interpreting the Convention so as to maintain uniformity of application, courts may apply the Convention in a dry and mechanical way. The Convention should be able to adapt to maintain its international character. For instance, a very daring court might find within the Convention an implied duty to avoid gross disparity in the contract so as to promote the observance of good faith in international trade, and that to allow a particular clause to exclude the Convention and/or any of its provisions might be a breach of such a duty. Such an approach is highly unlikely, as unconscionability is currently a question of validity under the Convention, given the legislative history. However in civil law countries, albeit in a very narrow way, courts have used the concept of good faith as a springboard off which other implied duties have been found to exist.

Honnold, in particular, is loath to follow Longobardi's view of "validity". He argues that to do so would make article 4 to act as a potential black hole, drawing much of what the Convention could cover into questions of "validity," and hence, narrowing the possible scope of the Convention. Honnold argues that "validity" should be given a fairly strict interpretation. The question courts should ask is whether or not the domestic rule is invoked by the same operative facts that invoke a rule of the Convention.[26] That is, in any particular fact situation, courts should query first whether the Convention has any

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[26] J Honnold *Uniform Law for International Sales Under the 1980 United Nations Convention* (2 ed, Kluwer, Deventer/Boston, 1989) 65.

provisions which can address the facts. If there are, then the Convention's provisions should apply and domestic law is not to be relied on.[27]

Part II: Acknowledgement clauses and Merger clauses

In many contracts, "it is commonplace .... to include clauses purporting to limit the parties' agreement to the terms set out therein and/or to negative the existence of actionable misrepresentation."[28] Of particular currency are merger clauses and acknowledgement clauses. Merger clauses are those clauses in which all precontractual negotiations are entirely excluded; the written document is said to be the entire contract between the parties. Acknowledgement clauses are those in which "one party acknowledges he has not relied upon statements made to him."[29]

What are the effects of such clauses if they are part of a contract governed by the Convention? From part I of this paper, it seems clear that if the clauses specifically state that they are to apply instead of the Convention, then they should take effect. Article 6 gives the parties the right to exclude, derogate or vary the effect of the Convention's provisions, subject to article 12. Moreover, the fundamental principle of the Convention is the primacy of contract. If parties specify that no representations outside the contract were relied on, or that the contract encapsulates the entirety of the relationship between the parties, then the inconsistent provisions of the Convention, articles 8 and 9, will not apply.

Merger clauses provide, in essence, that there were no statements and/or conduct outside the contract which the other party can rely on. A merger clause will exclude the entirety of article 9 because article 9 attempts to bind parties by any usages or practices to which the parties have impliedly or expressly agreed, all of which are things outside the contract.

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[27] See part III "Warranties and "as is" clauses" for an illustration of how domestic law is superseded by the Convention where the Convention has provisions which can apply to the facts.
[28] D McLauchlan "Merger and acknowledgement clauses under the Contractual Remedies Act 1979" (1988) 18 VUWLR 311.
[29] See n28.

Subsection (3) of article 8 is also excluded because its purpose is to determine the intentions of the parties from statements they made and the manner of their conduct before and after the formation of the contract. The rest of article 8, however, will not be excluded unless specifically referred to in the inconsistent merger clause, because subsections (1) and (2) are more general: they may be used to interpret statements made in and outside the contract in question.

Acknowledgement clauses may be different from merger clauses in effect: they may be less likely to exclude the operation of articles 8 and 9 because they do not deny that there were precontractual negotiations, statements made, nor that there were practices used by both parties (including *implied* practices and usages). Rather, they attempt to limit liability by denying that the other party relied on those actions. Therefore it may be that courts are less likely to infer from the existence of acknowledgement clauses that articles 8 and 9 of the Convention are to be excluded. However, acknowledgement clauses may also raise other issues when the court is determining remedies for breach of the contract, because they purport to negate the possibility of a party's *reliance* on a representation.

Out of habit or perhaps laziness, though, acknowledgement clauses and merger clauses are likely to be drafted without explicit mention of the Convention or its provisions. The question of exclusion then becomes more problematic. Because there is no explicit exclusion of the Convention, it may be necessary to determine the parties' intentions as to whether or not they wished to exclude the Convention; but in order to determine this, courts will have to bring into operation the very articles that the parties purportedly tried to exclude.

The situation which courts will face under the Convention when determining whether such a clause is to exclude the Convention or its provisions may then be very similar to the one faced by New Zealand courts under the Contractual Remedies Act 1979 in New Zealand. The Contractual Remedies Act provides generally that where there is a clause in the contract purporting to preclude a court from inquiring into or determining whether

statements made during negotiations constituted a misrepresentation or not, the court cannot be precluded from inquiring into and determining any such question, unless it is fair and reasonable that the provision is conclusive, having regard to all the circumstances of the case.[30] In order to determine whether it is fair and reasonable that such a clause be treated as conclusive, courts in New Zealand have instead treated such clauses as prima facie inconclusive; and then gone on to look at that which the clause was attempting to stop the court from looking at: all the surrounding circumstances.

Obviously, the intention in section 4 of the Contractual Remedies Act is different from that of articles 8 and 9 of the Convention. Section 4 of the Contractual Remedies Act *specifically* allows courts to go behind merger and acknowledgement clauses to determine the truth of the matter. The purpose of articles 8 and 9 is different. They are not aimed specifically at the question of such clauses. They are aimed at being more general in application. They are for interpreting any contractual clause. Here, article 7(2) should be taken into account. Whether or not merger and/or acknowledgement clauses can exclude the Convention is not "expressly settled" in the Convention. A "gap" can be therefore said to exist. Gaps are meant to be settled in conformity with the general principles of the Convention. Surely, then, article 8, which looks to the parties' statements and conduct to determine their intent, ought to be applied to determine the parties' intent as to whether they wanted to exclude the Convention.

It can be seen from this that only by using articles 8 and 9 can one exclude articles 8 and 9. It is submitted then, that in most cases, unless there has been explicit negotiations and consent on the clause in question, articles 8 and 9 *cannot* be excluded.

It may be argued that the Convention does not apply because in determining the nature of the clause, the court is also determining its *validity*. If articles 8 and 9 are to operate, the clause in question is not being given effect to. Thus, article 4 of the Convention should apply: the Convention will be excluded, and domestic law applies. Of course, such an

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[30] See the Contractual Remedies Act 1979, ss4-5.

argument will be of no use where New Zealand law is the applicable law: the Contractual Remedies Act sections 4 and 5 will apply. But it may be of use where the applicable law is less harsh on such clauses.

Against this, it may be argued that determining the nature of the clause is not an inquiry into its validity. Honnold's definition should apply: where the Convention has provisions relating to the problem at hand, the Convention should not be excluded. This view can be backed up by article 7(1) and (2) of the Convention. To derogate from the Convention where there are already appropriate provisions dealing with the problem, and to apply domestic law seems to contravene the intentions of the drafters' that regard be given to the Convention's international character. Furthermore, where there are matters not expressly settled by the Convention (here, whether or not merger or acknowledgement clauses can be looked at) they should be settled in conformity with the general principles on which the Convention is based.

These policy arguments may not be so persuasive, however: article 7(2) says matters *governed by this Convention* not expressly settled in it are to be settled in conformity with the Convention's general principles. Article 7 is not then applicable: the question is one of validity, which is not governed by the Convention.

The question of validity in relation to merger and acknowledgement clauses may arise in another way: where there is an allegation that there was a misrepresentation made, the result of which causes one party loss. Because the problem of misrepresentation is not a question of the rights and obligations arising from the contract within article 4, it is probably a matter of validity.[31] Where there is a question of misrepresentation, then, it is likely that the clause in question will be governed by domestic law. Both types of clauses, acknowledgement clauses and merger clauses, may be excluded for this reason, although acknowledgement clauses may be *more* likely to exclude the Convention and found invalid because they often purport to negate the existence of any actionable misrepresentation.

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[31] See n 15, 48.

Where the merger clause is so widely phrased so as to exclude all precontractual negotiations, such a use may be further considered "unconscionable." That is, the clause may be so unfair and so one-sided that to allow it to operate could only be done to the detriment of the weaker party (or parties).This would seem to raise the question of the clause's validity.

There are two suggested solutions. One is to say that the phrasing of the clause does raise a question of validity and therefore domestic law should apply. Unconscionability is after all a doctrine based on public policy. Honnold's view is, though, that validity should be construed narrowly.[32] Where the Convention actually deals with the problem, the Convention should not be excluded. "Validity" should be determined so as to exclude the Convention only where necessary. The Convention is supposed to be as self-contained and governing as possible. Here, whether or not precontractual negotiations can be looked at by the courts is governed by the Convention under articles 8 and 9. Therefore, whether or not the merger clause should apply is a question for the Convention.

Part III: Warranties and "as is" clauses

Article 35 of the Convention gives a number of warranties to the buyer. It provides that:

> (1)The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
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> (2) Except where he parties have agreed otherwise, the goods do not conform with the contract unless they:
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> (a) are fit for the purposes for which goods of the same description would ordinarily be used;

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[32] See n 26.

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

One of the first things to notice in article 35 is subsection (2), which specifically states that the parties may derogate from this article by agreement. It is a recognition by the drafters that parties may often want to draft their own warranties in respect of the goods that they are selling or buying. It may be that any contractual clause expressly or impliedly inconsistent with article 35 will be seen as more likely to exclude the Convention, subject to the intentions of the parties', the reading of the clause by a reasonable person in the same situation, and the need to promote the observation of good faith in international trade.

A number of commentators disagree.[33] They point out that the Convention has no provisions similar to those in (for instance) the American Uniform Commercial Code, which specify how to disclaim the statutory warranties.[34] They argue that the requirements of such disclaimer provisions may be issues of validity falling within the ambit of article 4

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[33] See n 2, 125; and generally, n23.

[34] UCC s2-316 provides:

(2) Subject to subsection (2), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face thereof."

(3) Notwithstanding subsection (2),

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults", or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no warranty.

of the Convention. Whether or not the exclusion of the warranties under article 35 is valid depends on the requirements of the domestic law, even where the parties have specifically agreed upon their own warranties.

However, this reading ignores subsection (2) of article 35. It is submitted that the drafted warranty clause(s) or the "as is" clause could be interpreted in the light of articles 7,8 and 9. Courts could determine whether the clause is to apply by asking whether a reasonable person understand such a clause as impliedly excluding article 35, and whether this reading would promote the observance of good faith in international trade. Only if such a reading gave an unreasonable or significantly disparate result might the question of implied exclusion become one of validity.

In determining whether the clauses are such that to give effect to them would be unfair in the light of all the pertinent circumstances article 7(1), which requires regard to be given to the Convention's international character and the observance of good faith in international trade might suggest that "as is" clauses are to be treated with suspicion. It may be detrimental to international trade to allow no or little protection for the buyer, even if the parties are of equal bargaining power; and perhaps even where the clauses were actually negotiated. But it is not the exclusion of the Convention which is in doubt, because surely such clauses, if negotiated, will exclude the Convention. Rather, the question is whether or not it would be just or right to give effect to such clauses. This may be a matter of "validity", not governed by the Convention, but rather by domestic law.

Part IV: Liquidated damages and penalty clauses

Liquidated damages clauses stipulate a sum of money that will be payable on a specified breach of the contract. Where that stipulated sum is so large that it might be regarded not only as compensation for loss resulting from the breach, but also as punishment for making that breach, the clause is often referred to as a "penalty" clause.

The existence of either type of clause in a contract may exclude the operation of articles 74 (damages in general)[35], 75 (substitute transaction), and 76 (Damages based on current price); and, perhaps as well, Articles 77 (mitigation of damages) and 78 (Interest)[36].

Where a liquidated damages clause is explicitly phrased so as exclude the Convention, it should apply and override the Convention, providing that it can be shown through articles 8 and 9 that the parties have in fact negotiated the clause, and have a reasonable understanding of their meaning. The general principle of the autonomy of the parties can also be a factor in favour of excluding the Convention, particularly where parties have negotiated the clause in question.

The implied exclusion of the Convention's articles relating to damages by the existence of liquidated damages/penalty clauses within the contract is again a question of interpretation: a matter of applying articles 6 to 9 as well as any other related articles to the facts. This will include determining how a reasonable person might interpret the clause to mean; the negotiations of the parties; previous dealings; whether such clauses are commonplace; and perhaps whether or not the drafting of the clause was in good faith.

No mention is made in the Convention of what will happen if a reasonable reading (by either the drafter or a reasonable person of the same kind as the other party) of such clauses gave an unreasonable result. For instance, where the amount specified in a liquidated damages clause is significantly less than the loss actually suffered by the other party; or where the amount specified in the penalty clause is significantly more than the damage actually done and the loss suffered. There are also "shotgun" or "blunderbuss"

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[35] Article 74 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.

[36] Article 78 provides:

> If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.

clauses, which Farnsworth[37] defines as those liquidated damages clauses which fix a single large sum for any breach, substantial or insubstantial. A question arises in relation to all of the examples given above as to whether they should be regarded as valid within the Convention ,because the operation of them may be very unfair in some circumstances, even where those clauses were actually agreed upon. In regards to the validity of penalty clauses, there has been a case in which it was found that, in the absence of any provision within the Convention regarding penalty clauses, domestic law is to apply.[38] By analogy, the operation of "shotgun" clauses and liquidated damages clauses set too high or low may also be found to be questions of validity to be dealt with by domestic law.

The mere existence of a liquidated damages/penalty clause may not be enough to exclude articles 77 and 78. There seems no reason why article 78 cannot apply where the party in breach is late in paying the amount specified under the liquidated damages/penalty clause, unless the clause in question specifically excludes either the Convention or the payment of any further interest, or some other clause has excluded entirely the operation of the Convention. Similarly, where the party in breach makes no attempt to mitigate their losses, article 77 would seem to apply unless the damages clause is framed so as to exclude any duty to mitigate. One may have to use articles 8 and 9 to determine whether the parties intended that only that sum specified in the clause be paid, and whether or not they turned their minds to the question of mitigating losses and of paying interest. Given that Article 78 is the article by far the most commonly litigated,[39] Enderlein suggests a buyer with strong bargaining power may want to include a clause setting their own interest rate: "The buyer shall pay interest at (specify percentage) per annum on delay in paying for the

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[37] EA Farnsworth *Contracts* (2 ed, Little, Brown and Company, Boston, 1990), 943.

[38] The seller in the case challenged the validity of the penalty clause limiting the amount of damages. Because there is no provision specifically governing penalty clauses, the court applied Austrian law and held that the seller was entitled to full damages despite the limitations of the penalty clause in the contract. (Parties not reported) 7197/1992 1992 (ICC, Court of Arbitration of the International Chamber of Commerce (Paris)) UNILEX, CLOUT (Case 104), quoted in L Del Duca and P Del Duca "Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)" (1996) 29 Uniform Commercial Code Law Journal 99, 108.

[39] Of the 142 cases involving the Convention that have been reported, 42 of the cases involve litigation on article 78.

goods. In no other situation will either party be liable for interest."[40] It is suggested that one provide a specific interest rate, as article 78 does not specify which country's rate of interest will be applicable.[41] However, he goes on to point out that this may face questions of validity under article 4. A similar clause might be drafted to exclude any duty to mitigate, but this is less likely to be accepted as valid, and is highly unlikely to be held to exclude article 77, even where specifically negotiated. It would certainly be contrary to the promotion of the observance of good faith in international trade.

The court may in fact decide two things on the clause: firstly, that it will not impliedly exclude article 78; or, if it is to operate at all, it will be interpreted so as not to exclude the duty to mitigate under article 78. Secondly, whether or not the clause is to in fact operate is a matter of validity to be determined by domestic law.

Part V: Force Majeure clauses

Occasionally, parties to a contract will be affected by events over which they have no control. These unforeseen events may make performance of one or more of the parties' contractual obligations difficult; even, in some cases, impossible. In such cases, questions then arise of where the risks lie; who owes whom what obligation; and what is to happen to the contract. In English common law, these questions are generally governed by the doctrine of frustration, which excuses non-performance where "a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."[42] However, as can be seen, the doctrine is limited: it is not enough that performance of the obligation be made different by the circumstances, but radically different. Moreover, where it operates, it automatically discharges the contract, even though the terms are certain. The situation, of course, may be different for parties whose contracts are governed by other countries' laws. French law, for instance, is somewhat

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[40] See n 20, 528.
[41] See n2, 108.
[42] *Davis Contractors Ltd.* v *Fareham U.D.C.* [1956] AC 696, 729.

more flexible. It provides for rescission of the contract where there is non-performance; and where part of the contract has been performed before the *force majeure* ("frustrating event") or the *force majeure* does not wholly or permanently prevent performance, under French law the promissee's obligation can be varied or reduced.[43]

In the Convention, the problems of frustration and impossibility of performance are dealt with under article 79:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not be reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if:
>
> (a) he is exempt under the preceding paragraph; and
>
> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
>
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
>
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

It has been pointed out, though, that article 79 may be one of the articles least used, "since almost all standard form contracts used in international sales, however rudimentary, contain *force majeure* clauses dealing in detail with events which would otherwise fall within article 79."[44] Force majeure clauses are attempts by contracting parties to anticipate

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[43] W Swadling "The Judicial Construction of Force Majeure Clauses" in McKendrick (ed) *Force Majeure and Frustration of Contract* (Lloyd's of London Press Ltd, London, 1990) 7-8.

[44] A Hudson "Exemptions and Impossibility under the Vienna Convention" in McKendrick (ed.) *Force Majeure and Frustration of Contract* (Lloyd's of London Press Ltd, London, 1990), 176.

unforeseeable eventualities and allocate the risks beforehand in an agreed, rather than an imposed, manner.[45]

The fact that force majeure clauses are so common in standard form contracts suggests, though, that little thought may be given in drafting and/or negotiating them. There then may be a problem of them having impliedly excluded the Convention. Again, this would be a matter of using articles 6 to 9 as well as any other related articles to interpret the meaning and extent of the clause in question. Validity will be another issue here as well; it may be argued that a force majeure clause in the contract is invalid within the meaning of the Convention where the force majeure clause is too wide in scope; for instance, where it excludes liability for negligence (a matter not governed by the Convention).

A more worrying problem is that in English law, where there is a frustrating event or impediment which stops parties from performing their obligations, the contract is made void *ab initio*. This is so even where the clause is clearly worded. Where such an event occurs, then, the operation of the force majeure clause would appear to be a matter of validity falling within article 4 of the Convention. If that were so, article 79 would *never* apply though. Commentators have said the solution lies in applying Honnold's test of validity: that is "whether the domestic rule is invoked by the same operative facts that invoke a rule of the Convention."[46] According to Swadling, there could be no recourse to domestic law where (for example) goods perished before the conclusion of the contract since the operative facts are covered by article 30 (seller's duty to deliver) and article 79.

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[45] See n43, 5.
A typical example of a force majeure clause was given in the English case, *J. Lauritzen A.S.* v *Wijsmuller B.V., The Super Servant Two* [1990] 1 Lloyd's Rep 1:

> in the event of *force majeure*, Acts of God, perils or danger and accidents of the sea, acts of war, war-like operations, acts of public enemies, restraints of princes, rulers or people or seizure under legal process, quarantine restrictions, civil commotions, blockade, strikes, lockout, closure of the Suez or Panama Canal, congestion of harbours or any other circumstances whatsoever, causing extraordinary periods of delay and similar events and/or circumstances, abnormal increases in prices and wages, scarcity of fuel and similar events, which reasonably may impede, prevent or delay the performance of this contract.

[46] See n 26.

Simple, commonly used force majeure clauses may not exclude the duty to give notice under article 79. If no specific mention is made of excluding that part of article 79, courts may find that there is no implied exclusion, not only because article 79(4) is an imperative duty, but because article 79(4) should be read alongside article 7. It would certainly be detrimental to the promotion of good faith in international trade to exclude such a duty. It might be argued too that the duty to give notice is a term in trade to which the parties have impliedly agreed, under article 9. Such a duty could be seen as one parties ought to have known, one which is well known in international trade, and regularly observed by parties to contracts of a similar type. Even if the other parts of article 79 were excluded, the observance of good faith in international trade would require the party unable to perform their contractual obligations to tell the other party, so that the other party can then limit their losses.

If there is a clause specifying that damages are to be given if there is frustration of the contract that such a clause might exclude the operation of article 79(5), which in itself excludes the right to damages. This would give the party suffering from the breach yet another remedy, in addition to the remedies of getting substitute goods, seeking *nachfrist*[47] and so on. Again, one might question the validity of this.

Conclusion

The problem of implied exclusion by various types of standard clauses inconsistent with provisions of the Convention highlights some of the serious faults within the Convention. The exclusion in article 4 of questions of validity, and the resort to domestic law in the absence of any general principles within the Convention in article 7(2), are two of the most worrisome features of the Convention. Although they are understandable, given the need to create some semblance of harmony amongst the various different legal systems, their

[47] See article 47 (additional period for performance by seller) and article 63 (additional period for performance by buyer).

inclusion in the Convention are to be regretted. Their existence within the Convention leaves a disturbing gap through which much of what could be dealt with by the Convention may disappear into. It is submitted that, at the very least, the drafters of the Convention ought to have provided some definition of validity. It is regrettable, too, that, given their prevalence in the international trading arena, and knowing of some of the effects they might have on contracts governed by the Convention, the drafters did not make specific provisions governing standard contractual terms.

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