

# LECTURE THREE

## CONTRACT FORMATION

Whilst the Sale of Goods Act 1979 provides some limited guidance on the formation of contracts for the sale of goods, mainly in order to define what is within and without the Sale of Goods Act itself, the general principles of contractual form are contained in the common law principles that have developed over an extended period of time.<sup>1</sup> There are a limited range of contracts where the form is specified by statute, in particular regarding finance (credit and guarantees) and the sale of realty. The contract under seal is a specialist form of contract which overcomes common law hurdles to the validity of a contract such as consideration. These exceptions apart, the general rules of contracting in respect of simple contracts are common law based.

The contractual formation process under the common law involves issues in respect of

- Offer contrasted with invitation to treat (including auctions and tendering procedures)
- Counter Offer
- Withdrawal of offer
- Acceptance
- Withdrawal of acceptance

In order for a contract to become legally enforceable under English Law several other factors have to be taken into account. None of these feature in the Sale of Goods Act 1979.

- Privity
- Consideration
- Capacity
- Legality

The three international conventions examined in this series of lectures address some of these concepts but not all. They are silent on questions of privity of contract, though this is perhaps not surprising since they are addressed to buyers and sellers who are most likely to be privy to the contract in any case. However, in the duties and remedies sections issues regarding third party rights are addressed. The question of consideration again is not addressed, but for quite different reasons. The notion of a sale involves reciprocal rights and duties and these are discussed in the next chapter, so in reality consideration is a fact and the conventions are not therefore addressing contracts unsupported by consideration. The second reason is that as will be seen in the next chapter, the link between consideration, the passing of property and the passing of risk is severed under these conventions.

The central objective here is to establish what the requirements are for the formation of a contract under these conventions and to contrast these with the requirements under English Law. These are central issues that impact upon the determination of jurisdiction by an arbitrator and further impact upon what obligations may have or may not have been undertaken between the parties.

The texts of the Conventions and the Sale of Goods Act 1979 are provided in the work sheets below and space is left for students to enter comments and cross reference other sources of law in order to conduct a critical analysis of the respective benefits and burdens of contracting on such terms. This should be done each week before the sessions to enable students to engage in group evaluation during workshops.

<sup>1</sup> For an overview of the English Law of Contract see Chapter 2 Law of International and Carriage of Goods. C.H.Spurin.

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### UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS

<b>ARTICLE 3 ULFCIS : Writing</b>	
An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.	
<b>ARTICLE 4 ULFCIS : Meaning of offer</b>	
<ol style="list-style-type: none"><li>1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.</li><li>2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and the provisions of the Uniform Law on the International Sale of Goods.</li></ol>	
<b>ARTICLE 5 ULFCIS : Communication of offer - revocation</b>	
<ol style="list-style-type: none"><li>1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.</li><li>2. After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.</li><li>3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.</li><li>4. A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under paragraph 2 of Article 6.</li></ol>	
<b>ARTICLE 6 ULFCIS : Acceptance</b>	
<ol style="list-style-type: none"><li>1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.</li><li>2. Acceptance may also consist of the despatch of the goods or of the price or of any other act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either, by virtue of the offer or, as a result of practices which the parties have established between themselves or usage.</li></ol>	
<b>ARTICLE 7 ULFCIS : Counter offer</b>	
<ol style="list-style-type: none"><li>1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.</li><li>2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.</li></ol>	

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<b>ARTICLE 8 ULFCIS : Communication of acceptance - time</b>	
<ol style="list-style-type: none"><li>1. A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror, and usage. In the case of an oral offer, the acceptance shall be immediate, if the circumstances do not show that the offeree shall have time for reflection.</li><li>2. if a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the hour of the day the telegram was handed in for despatch.</li><li>3. if an acceptance consists of an act referred to in paragraph 2 of Article 6, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present Article.</li></ol>	
<b>ARTICLE 9 ULFCIS : Late acceptance / waiver</b>	
<ol style="list-style-type: none"><li>1. If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.</li><li>2. If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed.</li></ol>	
<b>ARTICLE 10 ULFCIS : Acceptance / revocation pre communication</b>	
An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance.	
<b>ARTICLE 11 ULFCIS : Death of prospective party:</b>	
The formation of the contract is not affected by the death of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction.	

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### PART II FORMATION OF THE CONTRACT VIENNA

<b>ARTICLE 14 VIENNA Criteria for an offer</b>	
<ol style="list-style-type: none"><li>1. A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.</li><li>2. A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.</li></ol>	
<b>ARTICLE 15 VIENNA When offer becomes effective; prior withdrawal</b>	
<ol style="list-style-type: none"><li>1. An offer becomes effective when it reaches the offeree.</li><li>2. An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.</li></ol>	
<b>ARTICLE 16 VIENNA Revocability of offer</b>	
<ol style="list-style-type: none"><li>1. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.</li><li>2. However, an offer cannot be revoked:<ol style="list-style-type: none"><li>(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or</li><li>(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</li></ol></li></ol>	
<b>ARTICLE 17 VIENNA Rejection of offer followed by acceptance</b>	
An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.	
<b>ARTICLE 18 VIENNA Acceptance: time and manner for indicating assent</b>	
<ol style="list-style-type: none"><li>1. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.</li><li>2. An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.</li><li>3. However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.</li></ol>	

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<b>ARTICLE 19 VIENNA</b> Acceptance" with modifications	
<ol style="list-style-type: none"> <li>1. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.</li> <li>2. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.</li> <li>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.</li> </ol>	
<b>ARTICLE 20 VIENNA</b> Interpretation of offeror's time-limits for acceptance	
<ol style="list-style-type: none"> <li>1. A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.</li> <li>2. Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.</li> </ol>	
<b>ARTICLE 21 VIENNA</b> Late acceptances: response by offeror	
<ol style="list-style-type: none"> <li>1. A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.</li> <li>2. If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.</li> </ol>	
<b>ARTICLE 22 VIENNA</b> Withdrawal of acceptance	
An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.	
<b>ARTICLE 23 VIENNA</b> Effect of acceptance: time of conclusion of contract	
A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.	

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<b>ARTICLE 24 VIENNA</b> When communication "reaches" addressee	
For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.	

#### PART III SALE OF GOODS CHAPTER I General Provisions

<b>ARTICLE 25 VIENNA</b> Definition of "fundamental breach"	
A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.	

<b>ARTICLE 26 VIENNA</b> Notice of avoidance	
A declaration of avoidance of the contract is effective only if made by notice to the other party.	

<b>ARTICLE 27 VIENNA</b> Delay or error in communications	
Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.	

<b>ARTICLE 28 VIENNA</b> Specific performance and rules of the forum	
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 judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.	

<b>ARTICLE 29 VIENNA</b> Modification of contract; writing requirement	
<ol style="list-style-type: none"> <li>1. A contract may be modified or terminated by the mere agreement of the parties.</li> <li>2. A contract in writing, which contains a provision requiring any modification or termination by agreement to be in writing, may not be otherwise modified or terminated by agreement. However, a party may be precluded by misconduct from asserting such a provision to the extent that the other party has relied on that conduct.</li> </ol>	

# PRIVATE INTERNATIONAL LAW

## PART II FORMATION OF THE CONTRACT SOGA 1979

### *Contract of sale*

<b>2. Contract of sale : SOGA 1979</b>	
<p>(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.</p> <p>(2) There may a contract of sale between one part owner and another.</p> <p>(3) A contract of sale may be absolute or conditional.</p> <p>(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.</p> <p>(5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.</p> <p>(6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.</p>	

<b>3. Capacity to buy and sell : SOGA 1979</b>	
<p>(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.</p> <p>(2) Where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.</p> <p>(3) In subsection (2) above 'necessaries' means goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of the sale and delivery.</p>	

### *Formalities of contract*

<b>4. How contract of sale is made : SOGA 1979</b>	
<p>(1) Subject to this and any other Act, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.</p> <p>(2) Nothing in this section affects the law relating to corporations.</p>	

### *Subject matter of contract*

<b>5. Existing or future goods : SOGA 1979</b>	
<p>(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods.</p> <p>(2) There may be a contract for the sale of goods the acquisition of which by the seller depends on a contingency which may or may not happen.</p> <p>(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.</p>	

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<b>6. Goods which have perished : SOGA 1979</b>	
Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when a contract is made, the contract is void.	

<b>7. Goods perishing before sale but after agreement to sell : SOGA 1979</b>	
Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.	

### *The price*

<b>8. Ascertainment of price : SOGA 1979</b>	
(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.	
(2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.	
(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.	

<b>9. Agreement to sell at valuation : SOGA 1979</b>	
(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.	
(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.	

### EXAM QUESTION

Compare and contrast the applicable rules for the formation of an international sales contract under

- (a) The Common Law
- (b) ULIS, and
- (c) The Vienna Convention.

From a critical perspective, which set of rules (if any) provides the most coherent and logical code from the perspective of international traders.