Nisreen Mahasneh

Delivery and Conformity under CISG and English Law.

Seller's Obligations under a Contract for the International Sale of Goods. Vienna Convention& English Law Approaches.

LAP LAMBERT Academic Publishing

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Impressum/Imprint (nur für Deutschland/ only for Germany)
Bibliografische Information der Deutschen Nationalbibliothek: Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Coverbild: www.ingimage.com

Verlag: LAP LAMBERT Academic Publishing AG & Co. KG
Dudweiler Landstr. 99, 66123 Saarbrücken, Deutschland
Telefon +49 681 3720-310, Telefax +49 681 3720-3109
Email: info@lap-publishing.com

Herstellung in Deutschland:
Schaltungsdienst Lange o.H.G., Berlin
Books on Demand GmbH, Norderstedt
Reha GmbH, Saarbrücken
Amazon Distribution GmbH, Leipzig
ISBN: 978-3-8383-8158-9

Imprint (only for USA, GB)
Bibliographic information published by the Deutsche Nationalbibliothek: The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.d-nb.de.

Cover image: www.ingimage.com

Publisher: LAP LAMBERT Academic Publishing AG & Co. KG
Dudweiler Landstr. 99, 66123 Saarbrücken, Germany
Phone +49 681 3720-310, Fax +49 681 3720-3109
Email: info@lap-publishing.com

Printed in the U.S.A.
Printed in the U.K. by (see last page)
ISBN: 978-3-8383-8158-9

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Chapter 1: Research Scope and Purpose.

Introduction.

International trade[1] has become one of the most vital issues in modern life. It follows necessarily that the rapid growth of international trade needs an accurate legal system to facilitate the formation of contracts between merchants from different countries, and simultaneously to resolve the legal problems that may potentially arise out of contracts of sale.[1] Domestic laws are insufficiently capable of dealing with these issues. Likewise, they may not afford the flexibility required for the modern complicated commercial environment; this possibly being due to the domination that domestic law holds over an individual country.

Bearing this point in mind, is there then any viable alternative to domestic laws? The Vienna Convention on Contracts for the International Sale of Goods 1980 stands, among others, as a regime that attempts to replace domestic laws and respond to the problems arising from international transactions. The Convention is divided into four parts. The first considers its sphere of application and general provisions. Part two sets out the rules dealing with the issue of formation of the contract. Aspects of the sale of goods are addressed under part three. Part four sets out the final provisions.

This thesis is primarily concerned with exploring the issues of delivery and conformity, these are, among others, one of the most practical issues that often accompany the sale transaction. That is to say, they lie at the heart of the seller's obligations under a contract of sale. This thesis will therefore examine the position of English Law as represented by the Sale of Goods Act 1979. The position of the Vienna Convention on contracts for the International Sale of Goods 1980, which presents the latest

[1] Stewart F. Hancock, " A Uniform Commercial Code for International Sales? We Have it Now"(1995) 67 N. Y. ST. B. J. at p20.

international model dealing with the contract of sale, will also be examined. The objectives of the study are as follows:

(1) To explore the methods by which English Law as a domestic law and the Vienna Convention as an international model handle the aspects of delivery and conformity.

(2) To examine the extent to which the rules of delivery and conformity under English law are in line with their counterparts under the Vienna Convention.

(3) To analyse the areas of similarities and differences under both English law and the Convention and evaluate the policy of each of them in dealing with some particular issues.

(4) To investigate whether applying the Vienna Convention to international transactions is more practical than applying English law as a domestic law. This objective is clarified when dealing with some technical issues under the Convention and English Law, such as notices and remedies.

This chapter then concentrates on three issues. Firstly, the essentiality of harmonising the rules of international trade. Secondly, the historical background of the Vienna Convention. And thirdly, the position of the UK in relation to ratifying the Convention. It should be noted that each of these issues is wide and diverse, thus, only a brief allusion will be made to collateral issues in so far as they help in building the general understanding of the main subject of this thesis.

1:1: Harmonising the Law of International Trade.[2]

The significance of the Vienna Convention lies in understanding the importance of harmonising the rules which govern the international sale of goods. It has been said that harmonisation achieves two distinct purposes. On the one hand, it creates a special regime for international trade, whilst preserving the identity of domestic laws for local transactions. On the other hand, it facilities an establishment of a common market, the result of which is that the domestic laws lose their significance within the fields covered by the uniform law.[3]

Simultaneously, some opinions oppose this harmonisation of the law that governs commercial transactions. To justify this approach, it has been submitted that the domestic law is well known and understood, as both parties and the courts are familiar with it. This justification however, is highly criticised on the grounds that if this is true in local transactions, then this is not the case where the parties are from different countries. In other words, applying the rules of private international law leads also to the application of a foreign law in a foreign language which is not understood by at least one of the parties.[4]

Furthermore, it has been said that the principle upon which the Convention is based is the freedom of contract, in the sense that where a party concludes a satisfactory contract he would be able to fare as well under the Convention as is the case under his domestic law. This being so, the parties may prefer arbitration or attenuation dispute resolution rather than their domestic laws.[5]

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[2] For information about the methods of harmonisation and unifying the laws in trade see Ivan Szasz, *A Uniform Law on International Sales of Goods*, (Budapest: Akademiai, 1976).

[3] Roy Goode, "Reflections on the Harmonisation of Commercial Law" (1991) 1 ULR at p 54. In this regard, the CISG has been described as an equivalent to article 2 of the UCC which provides "This article shall be known and may be cited as the Uniform Commercial Code-Sales". It has been said here that article 2 unifies the sale law of the states, whilst the CISG unifies the sales law of the contracting countries. See David Frisch, "Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit" (1999) 74 Tulane L. R. at p504.

[4] Roy Goode, "Reflections on the Harmonisation of Commercial Law" (1991) 1 ULR at p73.

[5] Albert H. Kritzer, " International Sales Contracts: Challenges and Opportunities" in Co-

The parties may also choose some issues to be solved outwith the Convention.[6]

The second line of attack is that the Vienna Convention has left some matters unresolved which makes its scope inadequate. For example, the validity of the contract of sale, transferral of the property in the goods, and disputes between the seller and the buyer and a third party are not resolved under the Convention. Nevertheless, it has been proposed that this facet of the Convention does not decrease the value of its provisions. In other words, every work has a limitation for some reasons. Drafting a Convention to satisfy countries with widely different legal and economic systems, and cultures, justifies to some extent, this aspect of the Convention.[7]

It may be that the Convention will remain "the evil we do not know" until it is used and operated, thus, becoming an established law for international trade. It is beyond doubt that dealing with one law in international transactions is more practical. To illustrate, suppose that a merchant from China deals regularly with another from Germany. If the Convention is to be applied to their contractual relationships, then it has precedence over their own domestic laws. In a broader sense, harmonisation could clearly achieve numerous purposes, firstly, it avoids the complexity of the conflict of laws and the private international law. Secondly, it provides impartiality (non-biased). Thirdly, the adoption of a uniform law assists in removing the legal barriers in international trade and helps develop it.[8] Applying a uniform law

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Chairmen, David H. Chaifetz and Eugene E. Madara, *14th Annual Institute for Corporate Counsel, Doing Business and Investing Abroad,* (New York: Practising Law Institute, 1991) pp182-183.

[6] Maureen T Murphy, " United Nations Conventions on Contracts for the International Sale of Goods: Care Ting Uniformity in INT'L Sales Law" (1989) 12 Fordham INT'L JNL at p727. Art 6 of the Convention provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from, or vary the effect of any of its provisions".

[7] Roy Goode, , "Reflections on the Harmonisation of Commercial Law" (1991) 1 ULR at p73.

[8] Annex 1 to the Convention provides: "The adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".

in international trade may help small and undeveloped countries to improve their economies, since businessmen may choose not to accept the law of an undeveloped country to govern the contract. The Convention thus, might be a reasonable alternative.[9] In sum, it is true that the role of a uniform law can act as a bridge of understanding between two parties from two different legal and economic systems. Therefore the goal of legal certainty in international transactions will not be achieved unless one law is applicable.[10]

In the context of harmonisation, it is established that any attempt to unify the law must consider two major requirements. Firstly, this approved law should be applied in actual practice. It is noted here that permitting the parties to contract out of the Convention's provisions clashes in some way with this requirement. That is to say, two parties from different contracting states can choose any other national law to judge their contract. Consequently, the Convention would not be applied always as a uniform law.[11]

The second requirement in this respect is that the law must be applied uniformly. It must not be given different interpretations in various countries. In this context, the Vienna Convention provides some rules of interpretation, the most significant being the taking into consideration of the international nature and the purpose of uniformity.[12] The purpose of uniform application must

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[9] Angelo Forte, "The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom" (1997) 26 Univer Baltimore L. R. at p55

[10] Arther Posett, " Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" (1984) 45 Ohio State L. JNL at p269.

[11] Michael Joachim Bonell, "Some Critical Reflections on the New UNCITRAL Draft Convention on International Sale" (1978) ULR at p3.

[12] Michael Joachim Bonell, p3. See Art 7 (1) of the Convention, which provides: "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". In this context, Prof. John Honnold observes " One threat to international uniformity in interpretation is the natural tendency to read the international text through the lenses of domestic law. Years of professional training and practice out deep grooves. How can we avoid the tendency to think that the words we see are merely trying in their awkward way, to state the domestic rule we know so well". John Honnold, "The Sales Convention in Action-Uniform International Words: Uniform Application?"

also be achieved when the court is to deal with the matters governed by the Convention but not expressly settled under it.[13] In such cases, the dispute should be resolved by applying the general principles of the Convention. It has been argued here that whether a specific matter is governed by the Convention, and, consequently, should be solved by application of the general principles of the Convention is itself a matter of interpretation in a wider sense. In other words, it is likely that one court considers a specific matter as governed by the Convention, and applies the general principles. Meanwhile, another court may judge the same matter as not being governed by the Convention, and applies the rules of private international law.[14] Even with all the provisions under the Convention which help to unify the application of its provisions, in practice, reaching one interpretation is not easily achieved.[15] In this context, having different principles of procedures that govern the application of the provisions of the Convention may weaken uniformity.[16]

To overcome these difficulties, it has been said that reliance on scholarly writing as well as the legislative history of the Convention in interpreting its provisions may help in achieving uniform application of the Convention. This is because these resources allow lawyers to examine the methodology adopted by different legal systems in reading and interpreting the

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(1988) 8 J. L & COMM at p208. Furthermore, one of the suggested methods for applying the Convention uniformly is to encourage courts consulting and following the interpretations of other courts. See E A Farnsworth, "Convention on International Sale of Goods From Perspective Common" (1981) La Vendita Internazionale La Convenzione at p10.

[13] See Art 7 (2) which provides: "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 with the law applicable by virtue of the rules of private international law".

[14] Peter Schlechtriem, "Unification of the Law for International Sale of Goods" (1987) German National Reports at p125.

[15] Louis F. Del Duca, " Developing Transitional Harmonisation Procedures for the Twenty-first Century" in Ross Cranston and Roy Goode, *Commercial and Consumer Law National and International Dimensions*, (Oxford: Clarendon Press, 1993) at p38.

[16] Michael G. Bridge "The Bifocal World of International Sales: Vienna and Non-Vienna" in Ross Cranston, *Making Commercial Law, Essays in Honour of Roy Goode*, (Oxford: Clarendon Press, 1997) at p287.

international text. In addition to this, reference to the background of the Convention counteracts the tendency that the international text should reflect the details of a particular domestic law.[17] Besides, any interpretation of the Convention must be carried out autonomously without reference to the comparable terms and concepts under the law of anyone country.[18]

However, under the Convention this uniformity is threatened in some circumstances. Firstly, the Convention is disapplied to some particular issues such as the transferral of the ownership and the validity of the terms under the contract. Secondly, matters, which are not settled by the Convention and in respect of which no general principles under the Convention exist, are to be solved in the light of the rules of private international law.

The drafters of the Vienna Convention faced the problem of disparate legal and economic differences between the states. The East and the West disagreed upon some notions. Such as, the need for writing and whether usage should be binding. Similarly, there were some sensitive issues with the third world countries. For instance, these countries insisted on notice of non-conformity. They also insisted that such notice must be given even if one party wished to suspend or avoid the contract for anticipatory fundamental breach. As will be shown later, in order to reach a compromise, the Convention provides that notice is required only if time allows and it is not required if the other party has declared that it will not perform its obligations.[19]

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[17] John Honnold, "The Sales Convention in Action-Uniform International Words: Uniform International Words: Uniform Application" (1988) 8 JL & C pp208-209.

[18] Peter Schlechtriem at p125.

[19] Sara G Zwart, "The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles" (1988) 13 North Carolina JNL INT'L & Comm. Regu. at p116. In Socialist countries the contract must be in writing. Whilst under the Convention writing is not required. To reach a compromise in this regard Art 96 allowed states which require writing to declare Art 11 inapplicable where any party has his place of business in that state. Moreover, Eastern countries do not give effect to trade usage, where in Western countries custom and usage are general rules. Nonetheless, the Convention provides under Art 9 (1) that " The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves". See Sara Zwart at p 116. According to some writers, the non-existence of a statute relating to fraud

Indeed, the Convention is after all, a mixture of rules between the two main schools of legal thought in the world. Within the context of this thesis, it will be noted that some remedies are affected by civil law, such as the remedy of specific performance and reduction of the price, whilst the doctrine of fundamental breach as well as anticipatory breach have roots in the common law.

1:2: Historical Background.

The first attempt at drafting a uniform law for the sale of goods was in 1930 by the International Institute for the Unification of Private Law (UNIDROIT). A preliminary draft was issued in 1935, but for reasons connected with the World War II work was suspended. In 1951 21 countries encouraged completing the project, and, subsequently, in 1956 and 1963 drafts were sent to governments for revision. Meanwhile, the work continued for a uniform law for the formation of the contract, and a draft of this law was ready in 1958.[20] In a consequence, in 1964 a Diplomatic Conference was held at the Hague to adopt the Uniform Law on Contract Formation (ULF), and a Uniform Law on Substantive Sales (ULIS). These laws came into force in 1972.[21]

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under the Convention presents a major reason for rejecting it, on the grounds that a party can unintentionally be bound by a casual oral agreement. See R M Lavers, Michael Best & Friedrich Wisconsin, "CISG: To Use or not to Use?" (1993) INT Bus. Law at p11. It is submitted that a contract governed by the convention falls within one of six categories. Firstly, a contract between parties from common law and civil law. Secondly, a contract between parties from different civil law countries. Thirdly, a contract between parties from different common law countries. Fourthly, a contract between parties that both are from a developed legal system. Fifthly, contracts between parties where one of them is from a developed legal system, whilst, the other is from a developing legal system. Finally, contracts between parties from countries with developing legal systems. See Albert H. Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, International and Resources" in Cornell International Law Journal, *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, (Boston, The Hague, London: Kluwer Law International, 1995) at p150.

[20] John Honnold, *Uniform Law for International Sales*, 3rd ed. (The Hague: Kluwer Law International, 1999) at p5.

[21] Robert W. Schaaf, "Entry into Force in 1988 of UN Convention on Contracts for the International Sale of Goods" (1987) 15 INT JNL Legal Information at p56. See also J. D.

However, these uniform laws were not a satisfactory product, mainly because they were only drafted by common law lawyers and set rules that were unknown to civil law countries. The result was that the uniform laws did not meet with widespread.[22]

In 1966 the United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly.[23] Membership in UNCITRAL was limited to 36 countries, representing Africa, Asia, Eastern Europe, Latin America, Western Europe and others.[24] This time the drafting committee was composed of members representing fourteen countries and consequently, reflected the distinct legal systems of the world. As a result, common law, civil law, Islamic law, Hindu law, Chinese law and other systems were all included.[25] Within the decade between 1968-1978 the UNCTIRAL worked to develop a Convention which might be acceptable to most of the countries. The first draft was submitted in 1978 accompanied by a commentary from the UNCTIRAL Secretariat.[26]

The UN Conference on Contracts for the International Sale of Goods adopted the Vienna Convention on April 11 1980 with the participation of 62 states.[27] After over half a century of efforts the Vienna Convention entered into force in 1988, when the condition of its operation was met. In other words, when it was ratified by not less than ten countries.[28] The first eleven contracting states

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Feltham, "The United Nations Convention on Contracts for the International Sale of Goods" (1981) JBL at p346.

[22] John Honnold, "Uniform Law for International Trade- Progress & Prospects" (1986) 20 INT'L Law pp 636-637.

[23] Kazuaki Sono, " The Vienna Sales Convention: History and Perspective" in Petar Sarcevic and Paul Volken, *International Sale of Goods*, (New York, London, Rome: Oceana Publications, 1988) at p 3

[24] John Honnold, ""The Sales Convention: Background, Status, Application" (1988) 8 JNL L& COMM at p4.

[25] V Susanne Cook, " The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods" (1988) 50 Univ. Pittsburgh L. R. at p202.

[26] Michael Stonberg, " Drafting Contracts under the Convention on Contracts for the International Sale of Goods" (1988) 3 Flori. INT'L L. JNL at p245.

[27] John Honnold, "UN Convention on Contracts for the International Sale of Goods 1980" (1981) 15 JNL W. T. L. at p265. See also E Allan Farnsworth, "The Vienna Convention: History & Scope" (1984) 18 INT'L. Law at p18.

[28] Christine Moccia, "The United Nations Convention on Contract for the International Sale

were: The United States, Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, Yugoslavia, and Zambia.[29] At the date of submitting this thesis, 58 states have legally accepted and ratified the Convention.[30]

1:3: The Position of the UK.

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of Goods & the Battle of the Forms" (1989) 13 Fordham INT'L L. JNL at p655.

[29] Claire M. Germain, "The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature" in Cornell International Law Journal, *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, (Boston, The Hague, London: Kluwer Law International, 1995) at p119. It is worth indicating here that the Convention had received wide spread support and acceptance in the United States prior to ratification it. For example, it was supported by business organisations, the National Foreign Trade Council, the U. S. Council for International Business, the American Arbitration Association and the American Bar Association. See Peter Winship, "International Sales Contracts under the 1980 Vienna Convention" (1984) 17 UCCLJ at p71.

[30] See the web site http://cisgw3.law.pace.edu Indication may be made here to the position of some states in relation to the ratification of the Convention. For example, in 1992 the Convention went into force in Canada. See Laura A Donner, " Impact of the Vienna Sales Convention on Canada" (1992) 6 Emory INT'L L. R. at p743. In this regard, the Canadian Sale of Goods Act is based substantially on the English Sale of Goods Act 1893. See Lisa K Tomko, "United Nations Convention on the International Sale of Goods: its Effect on United States & Canadian Sales Laws" (1988) 66 Univ Detroit L. R. at p82. As far as Canada is concerned, it has been said that ratifying the Convention by it helped it to pay its role in the Convention's future, so as to develop it and change in its provisions. Moreover, Canada participated actively at the Vienna Conference, and it is active in other international organisations concerned with harmonisation of private law within international arena. See Ziegel," Canada & the Vienna Sales Convention" (1987) 12 Cana Bus. L. JNL at p368. As for Switzerland, the Convention became an integral part of Swiss law in 1991. See Quentin Byrne, "Switzerland: International Trade-United Nations Convention on Contracts for the International Sale of Goods Applies in Switzerland" (1991) 2 ICCLR at p103. However, South Africa for example, is not a member of the Convention. It is worth indicating here that the law of South Africa is described as "Roman-Dutch law" and is a mixture of English common law and "pre-codal civil law". Nonetheless, the area of mercantile and business law are borrowed heavily from comparable English statutes. See Clement NG ONG OLA, "The Vienna Convention of 1980 in the Southern Africa Legal Environment: Formation of the Contract of Sale" (1992) 4 African JNL INT'L & Comp. L. pp835-836. Likewise, Ireland has not ratified the Convention yet. It is proposed in this regard that Ireland should ratified it for the following reasons. Firstly, it facilities the trade relationships between different parties. Secondly, it embodies a compromise between the civil law and the common law. Thirdly, Irish law is inadequate to cope with the international contracts. It should thus be amended to reflect the aims of the Convention. Moreover, The Convention does not materially interfere with Irish law, as it is based on the principle of freedom of contract. See John F Manning, "The 1980 Vienna Sales Convention and its Potential for the Enhancement of Irish International Commerce" (1994) 4 Irish Stud L. R. pp106-112. Finally, in 1994 the Singapore Academy of Law has published a report made by the Sub-Committee on Commercial Law of the Law Reform Committee suggesting that Singapore should ratify the Convention and laying out the Advantages of ratification. However, at then of submission of this thesis Singapore is not a contracting state yet. See Singapore Academy of Law, "Singapore: Contracts for the International Sale of Goods on Whether Singapore should Ratify the Vienna Convention" (1995) 21 Comm. L. Bulletin pp162-164.

Despite the fact that most European countries have ratified the Convention, doubt and uncertainty about it is still prevalent within the UK. In this context, some opinions oppose ratification, whilst, others believe that it is time that the UK ratifies it. In justifying why Britain should be a contracting state, it has been said that the Convention provides neutral rules that can be applied to international sales. And stands as a mixture between Civil and Common law.[31] Furthermore, it is arguable that the English Sale of Goods Act may not be appropriate for modern trade, whilst the Convention has been specifically drafted to meet the requirements of modern trade.[32] It has been further argued that the refusal to accept the Convention in the UK will not give British merchants immunity from its provisions. To illustrate, the Convention might be applied by an arbitrator, by a court as the proper law of the contract, or as the choice of law. The fear in such cases is that the English courts will find themselves deprived of an influential impact to the interpretation of the provisions of the Convention.[33]

In 1980 the Department of Trade and Industry commissioned a poll as to whether Britain should ratify the Convention or not. The outcome seemed to suggest that Britain should not ratify the Convention. Two major reasons were behind this outcome, in the first place, there are many differences between the rules of the Convention and the domestic law of sale. Furthermore, it is proposed that English law is a world brand name and ratifying the Convention might have the result of jeopardising this position. That is to say, applying the Convention instead of English law to international contracts of sale minimises the role of English law.[34]

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[31] Angelo Forte, "op. cit." at p53

[32]Derek Heath, "The Vienna Convention: Friends or Foe?" (1991) 29 Law Soc'Y J. at p66.

[33] Michael G. Bridge, "The Bifocal World of International Sales: Vienna and Non-Vienna" in Ross Cranston (ed.) *Making Commercial Law, Essays in Honour of Roy Goode*, (Oxford: Clarendon Press, 1997) at p278

[34] Forte, "op. cit." pp58-59. It is submitted here that the Convention might influence the national law by one of three methods. Firstly, despite the fact that the court is not bound to