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# **ACCA Paper F4**

## **Corporate and Business Law**

For exams in 2010



## United Nations Convention On Contracts for the International Sale Of Goods (1980)

This is an extremely important area of study, both for the exam and also for conducting business as a chartered certified accountant in today's globalised business environment.

You can probably expect at least two and quite possibly three questions in the exam to be on the UN Convention.

### Sphere of Application of the Convention

The Convention applies to contracts for the sale of goods (note that this is distinct from services!) where the contract crosses jurisdictional borders, between states that have ratified the Convention.

#### Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

#### Article 2

This Convention **does not apply** to sales:

- (a) of goods bought for **personal, family or household use**, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by **auction**;
- (c) on execution or otherwise by authority of law;

- (d) of **stocks, shares, investment securities, negotiable instruments or money;**
- (e) of **ships, vessels, hovercraft or aircraft;**
- (f) of electricity.

### Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales **unless the party who orders the goods** undertakes to **supply a substantial part of the materials** necessary for such manufacture or production.

(2) This Convention **does not apply to contracts** in which the preponderant part of the obligations of the party who furnishes the goods consists in the **supply of labour** or other services.

...

### Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

### Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

### Tutors' notes:

Article 6 of the Convention allows the contracting parties to opt out of the Convention's terms, or amend them. Commonly, the Convention's default terms for transfer of risk of goods from seller to buyer are amended by the use of the International Chamber of Commerce incoterms. These are discussed in chapter 5.

### Article 10

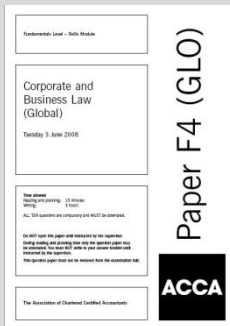
For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

**Tutors' notes:**

It is normally the place of business that is important, rather than the registered address of each of the parties.

Article 12 states that it is not necessary for any contract to be in writing, although this may be normal as it provides evidence of what the contracting parties agreed to, in the event of a dispute between the parties. National law may still require the contracts to be written.



**Past Real Exam Question  
Paper 2.2 GLO, June 2004  
Question 9**

The United Nations Convention on Contracts for the International Sale of Goods operates only under certain circumstances and applies only to certain transactions.

**Required:  
Explain**

- (i) the sphere of application of the Convention;** (5 marks)
- (ii) those transactions that are expressly not covered by the convention.** (5 marks)

**(b)** Ahmed carries out a business manufacturing and selling leather bags in Baria, a country which is a signatory to the UN Convention. Chic carries out a similar business in Damia, a country which is not a signatory to the convention, and Eve has her place of business in Falia, which is a signatory to the convention.

Ahmed entered into contracts with Chic and Eve to produce bags to his particular design.

With regard to Chic, Ahmed agreed to purchase 1,000 bags. The contract stated that the leather for the bags, which Chic had to provide, had to be of a specified high quality.

Ahmed also agreed to purchase a similar quantity of bags from Eve. However, because the high quality of leather required was not available in Falia, the contract stated that Ahmed would supply the leather as well as the design, and Eve would

simply manufacture the bags.

Both contracts state that the law of the supplier's country shall apply and both have now given rise to disputes.

**Required:**

**Analyse the scenario and advise the parties whether the United Nations Convention on Contracts for the International Sale of Goods will apply in each case.**

(10 marks)

**(20 marks)**

### Formation of Contract

The definition of a contract may vary between different jurisdictions. For example, in the English legal system, a contract must contain each of these elements:

- Offer
- Acceptance
- Intention to create legal relations
- Consideration (ie something of some sufficient, but not necessarily adequate, value).

The UN Convention places a higher emphasis on the need for an agreed price (or an obvious mechanism for agreeing a price) and has no formal need for a intention to create legal relations than the English common law.

#### **Article 14: Definition of Offer**

(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.**

(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.

Note the crucial difference between an offer (which meets the definition above) and an "invitation to treat", which is an invitation for the other party to make an offer. An invitation to treat may appear to be an offer at first glance, but on more careful examination lacks sufficient clarity to be an offer. Any purported acceptance of an invitation to treat is therefore not an offer.

### **Article 15: *Effect of Offer***

- (1) An offer becomes **effective** when it **reaches the offeree**.
- (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**.

### **Article 16: *Offeror's Revocation of Offer***

- (1) Until a contract is concluded an offer may be **revoked** if the revocation reaches the offeree **before he has dispatched an acceptance**.
- (2) However, an offer cannot be revoked:
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### **Article 17**

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

### **Article 18: *Acceptance of Offer***

- (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**.
- (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**.
- (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.

### **Article 19: Counter-Offer**

(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.

(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.

(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.

### **Article 20: Time for Acceptance of Offer**

(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.

(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.

### **Article 21: Late Acceptance**

(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.

(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.

### **Article 22**

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

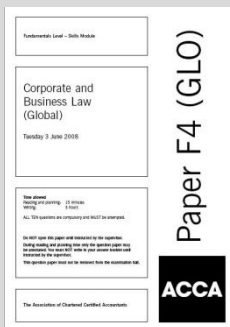
### Article 23

**A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.**

### Article 24

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**.

Tutors' Note: This means that it is necessary to prove receipt of documents. Unlike in English law, proof of postage does not appear normally to be sufficient.



### Past Real Exam Question Paper 2.2 GLO, December 2004 Question 6

**Within the context of the UN Convention on Contracts for the International Sale of Goods, explain the following:**

- |                                |                   |
|--------------------------------|-------------------|
| <b>(a) offer</b>               | (3 marks)         |
| <b>(b) invitation to treat</b> | (3 marks)         |
| <b>(c) counter-offer.</b>      | (4 marks)         |
|                                | <b>(10 marks)</b> |

### Obligations of the Seller

The obligations of the seller are principally to:

- **Deliver** the goods as agreed.
- Deliver supporting **documents** as agreed.
- Deliver the goods **on time**.
- Ensure the goods **conform** to the description in the contract.
- Ensure the goods are **fit for purpose**.
- Ensure the goods are **properly packaged**.
- Ensure the goods are free from any **third party claims** (eg outstanding finance or if the goods are security of a loan).
- Take reasonable steps to **preserve the goods** if the buyer is late taking delivery of them.

### Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

### Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods - in **handing the goods over to the first** carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a **particular place** - in placing the goods at the **buyer's disposal at that place**;
- (c) in other cases - in **placing the goods at the buyer's disposal** at the place where the **seller had his place of business** at the time of the conclusion of the contract.

### Article 33

The seller must deliver the goods:

- (a) if a **date is fixed** by or determinable from the contract, on that date;
- (b) if a **period of time is fixed** by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, **within a reasonable time** after the conclusion of the contract.

### Article 34

If the seller is bound to hand over **documents** relating to the goods, he must **hand them over at the time and place and in the form required by the contract**. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

### **Conformity with Description and Fitness for Purpose**

This is a relatively frequently examined part of the UNCISG and you should be aware of its terms in some detail.

#### **Article 35: *Conformity***

**(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.**

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

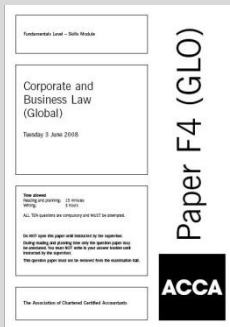
(a) are **fit for the purposes** for which goods of the same description would **ordinarily be used**;

(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**.



**Past Real Exam Question  
Paper 2.2 GLO, December 2004  
Question 9**

**(a) Explain the seller's obligations in respect of requirements as to the quality of goods supplied, under Article 35 of the UN Convention on Contracts for the International Sale of Goods.** (10 marks)

**(b)** Ari conducts a manufacturing business in Beria making specialist equipment. He has discovered a new manufacturing process, which uses computer technology in a highly innovative way. In order for the process to function it requires microchips of a highly specialised nature. There are a number of specialist microchip manufacturers in Ceria and in order to get the large number of chips he requires Ari negotiates the following transactions:

- (i) Ari tells Del, who makes a particular type of chip, that he will need the chips to operate his new system. Del assures him that the chips he will supply will be perfectly suitable for the task.
- (ii) Ari knows that Eve makes chips to the same specification and quality as Del, so he orders chips from Eve, on the assumption that they will do the task required.
- (iii) Ari approaches Flo, who usually makes less specialist microchips, to see if he can make chips to the more precise standard. In order to demonstrate their ability, Flo manufactures a prototype chip, which Ari is satisfied will work with his new process.

Unfortunately when all of the chips are delivered to Ari, none of them are suitable for use within the new machinery. Both the chips provided by Del and Eve are simply not suitable for the task required of them, and the chips actually provided by Flo are not as good as the original prototype.

**Required:**  
**Advise Ari whether he has any claim against the suppliers for lack of conformity with quality standards under the UN Convention on Contracts for the International Sale of Goods. You can assume that the convention provisions apply to all the transactions.** (10 marks)  
**(20 marks)**

### **Article 37: *Partial Delivery***

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

### **Article 38: *Buyer's Duty to Examine Goods***

(1) **The buyer must examine the goods**, or cause them to be examined, **within as short a period as is practicable in the circumstances.**

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

...

### **Article 39**

(1) **The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller** specifying the nature of the lack of conformity **within a reasonable time** after he has discovered it or ought to have discovered it.

...

### **Article 40**

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

### **Article 41**

The seller must deliver goods which are **free from any right or claim of a third party, unless** the buyer agreed to take the goods subject to that right or claim.

### **Article 85**

**If the buyer is in delay in taking delivery** of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, **the seller must** take such steps as are reasonable in the circumstances to **preserve them**. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

## Obligations of the Buyer

The principal obligations of the buyer under the Convention are to:

- **Take delivery** of the goods if they are delivered on the delivery date (Art 53).
- **Pay** the agreed price and in the agreed method (Art 53).
- **Inspect** the goods (Art 38 above).
- **Preserve** the value of the goods, even if they are incorrect (Arts 86 – 88).

### Article 52

(1) **If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.**

(2) If the seller delivers a **quantity of goods greater** than that provided for in the contract, **the buyer may take delivery or refuse to take delivery of the excess quantity**. If the buyer takes delivery of all or part of the excess quantity, **he must pay for it** at the contract rate.

### Article 53

The buyer **must pay the price for the goods and take delivery of them** as required by the contract and this Convention.

### Article 55

Where a contract has been validly concluded but **does not** expressly or implicitly fix or **make provision for determining the price**, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the **price generally charged at the time** of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

### Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the **net weight**.

### Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### Article 58

(1) If the buyer is not bound to **pay the price** at any other specific time, he **must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal** in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) **The buyer is not bound to pay the price until he has had an opportunity to examine the goods**, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### Article 59

The buyer **must pay the price** on the date fixed by or determinable from the contract and this Convention **without** the need for any request or compliance with **any formality on the part of the seller**.

### Buyer's Duty to Preserve Goods

#### Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he **exercises the right to reject them, he must take possession of them** on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

...

#### Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

### Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 **may sell them by any appropriate means if there has been an unreasonable delay by the other party** in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are **subject to rapid deterioration** or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 **must take reasonable measures to sell them**. To the extent possible **he must give notice to the other party of his intention to sell**.

(3) A party selling the goods has the **right to retain** out of the proceeds of sale an amount equal to the **reasonable expenses** of preserving the goods and of selling them. He must account to the other party for the balance.

### Remedies for Breach

If the **seller breaches** the contract (ie fails to stand by a core term of the contract), remedies available to the buyer include:

- Enforcing performance by the seller ("specific performance") (Art 46)
- Avoidance of the contract in full (Art 49)
- Reduction in price (Art 50)
- Damages (Art 74), subject to the general duty to mitigate losses (Art 77).

If the **buyer breaches** the contract, remedies available to the seller include:

- Enforcement of payment (Art 62) with interest (Art 78)
- Avoidance of the contract in full (Art 64)
- Damages (Art 74), subject to the general duty to mitigate losses (Art 77).

### Anticipatory Breach and Instalment Contracts

Anticipatory breach is where one party has good reason to believe that the other party will not honour their obligations under a contract.

### **Article 71**

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

### **Article 72**

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

### **Article 73**

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## Exemption from Liability for Breach

### 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 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 a 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.



**Past Real Exam Question  
Paper 2.2 GLO, June 2005  
Question 7**

**Within the context of the UN Convention on Contracts for the International Sale of Goods, explain the extent to which an impediment beyond their control may allow a person to avoid liability for breach of contract.  
(10 marks)**

### Want to Know More?

The full text of the UN Convention for International Sale of Goods can be downloaded free at <http://www.cisg.law.pace.edu/cisg/text/treaty.html>

### Past Real Exam Questions

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		<b>Done</b>	<b>Revised</b>
Sphere of application	Q9 June 2004	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Offer, invitation, counter-offer	Q3 December 2003	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 June 2004	<input type="checkbox"/>	<input type="checkbox"/>
	Q6 December 2004	<input checked="" type="checkbox"/>	<input type="checkbox"/>
	Q8 December 2007	<input type="checkbox"/>	<input type="checkbox"/>
	Q2 June 2008	<input type="checkbox"/>	<input type="checkbox"/>
Termination of offer	Q8 December 2008	<input type="checkbox"/>	<input type="checkbox"/>
	Q4 December 2003	<input type="checkbox"/>	<input type="checkbox"/>
Acceptance of offer	Q2 June 2006	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 December 2005	<input type="checkbox"/>	<input type="checkbox"/>
	Q2 December 2006	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 F4 GLO Pilot	<input type="checkbox"/>	<input type="checkbox"/>
	Q2 December 2006	<input type="checkbox"/>	<input type="checkbox"/>

	Q8 December 2007	<input type="checkbox"/>	<input type="checkbox"/>
Quality and conformance	Q9 December 2004	<input type="checkbox"/>	<input type="checkbox"/>
	Q9 June 2006	<input type="checkbox"/>	<input type="checkbox"/>
	Q2 December 2007	<input type="checkbox"/>	<input type="checkbox"/>
	Q8 June 2008	<input type="checkbox"/>	<input type="checkbox"/>
General buyer duties	Q6 June 2005	<input type="checkbox"/>	<input type="checkbox"/>
	Q8 June 2008	<input type="checkbox"/>	<input type="checkbox"/>
Preservation of goods	Q4 December 2005	<input type="checkbox"/>	<input type="checkbox"/>
	Q4 F4 GLO Pilot	<input type="checkbox"/>	<input type="checkbox"/>
Breach and remedies	Q7 December 2004	<input checked="" type="checkbox"/>	<input type="checkbox"/>
	Q9 June 2005	<input type="checkbox"/>	<input type="checkbox"/>
	Q9 December 2005	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 June 2006	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 December 2006	<input type="checkbox"/>	<input type="checkbox"/>
	Q8 F4 GLO Pilot	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 December 2007	<input type="checkbox"/>	<input type="checkbox"/>
	Q3 December 2008	<input type="checkbox"/>	<input type="checkbox"/>
Exemptions from breach	Q7 June 2005	<input checked="" type="checkbox"/>	<input type="checkbox"/>

## Solutions to real past exam questions

### Examiner's solution to Question 9, June 2004 Paper 2.2 GLO

The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference in Vienna on 11 April 1980 (hence its common title the Vienna Convention).

The articles on scope of application state both what is included in the coverage of the Convention and what is excluded from it. Article 1 of the convention states that it applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

Article 95 allows any state to declare that it will not be bound by the second of the above provisions of article 1 and a few states, including the United States of America, have availed themselves of that opportunity.

Article 1 also provides that the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

Article 1 also states that neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention. Thus it is the status of the states between which the business takes place that is important rather than the status of the individuals conducting the business.

Article 10 states that if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, i.e. the place where the contract actually originated. If, as in the case of most ordinary individuals, a party

does not have a place of business, then the state in which they normally live is the place of business for the purposes of the convention.

**(ii)** The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale, the nature of the sale or the nature of the goods. Article 2 of the convention expressly states that it does not apply to the following sales:

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

**(b)** To deal with this problem scenario requires the application of the law stated in part (a).

*Ahmed and Chic*

It is clear that the contract between the two parties is not a consumer transaction, nor does it involve any of the articles expressly excluded by article 2 of the convention. It is equally apparent that the contract involves the sale of goods between parties whose places of business are in different states. The problem facing Ahmed is although his state Baria is a signatory to the convention, Damia, Chic's state is not. Consequently it is apparent that the transaction cannot be dealt with under Article 1(a) of the convention, which requires that the states of both parties must be signatories to the convention. Nor would it appear likely that it could be dealt with under the convention by virtue of article 1(b), which requires that the rules of private international law should lead to the application of the law of a Contracting State. As the state of the seller, it would appear that the laws of Damia would be applied, and consequently, as Damia is not a contracting state, the convention cannot apply.

*Ahmed and Eve*

In this instance both parties have their places of business in states which are signatories to the convention, which would normally mean that the convention would apply. However, there is a further complication in this case, which also prevents the operation of the convention. The convention only applies with regard to contracts for the sale of goods. Article 3 expressly states that a contract for the supply of goods to be manufactured or produced is considered to be a sale *unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production.*

Consequently when the preponderant part of the obligations of the party who furnishes the goods consists merely in the supply of labour or other services, the Convention does not apply. Such is the situation with regard to Ahmed and Eve, so once again the convention cannot be applied.

### **Examiner's solution to Question 6, December 2004 Paper 2.2 GLO**

#### **(a) Offer**

Part Two of the United Nations Convention for the International Sale of Goods provides that the formation of the contract is concluded through the exchange of an offer, followed by due acceptance of that offer. Once an offer has been accepted, a contract comes into existence and the parties are bound by the terms of their agreement.

Article 14(1) of the Convention provides that: '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.'

Thus in order for a proposal for concluding a contract to constitute an offer,

- (i) it must be addressed to one or more specific persons. Consequently the offer cannot be made to 'the world at large' as it can in common law jurisdictions.
- (ii) it must be sufficiently definite. This requires that the offer must indicate the goods to be transferred and either expressly or implicitly fix or make provision for determining the quantity of the goods to be transferred and the price to be paid.
- (iii) it must indicate that the offeror intends to be bound on those terms in case of acceptance.

Offers may be revoked as long as any revocation reaches the offeree before he has dispatched an acceptance. However, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked 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. An offer becomes effective when it reaches the offeree. However 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 (*Article 15(2)*).

#### **(b) Invitation to treat/invitation to make offers**

Any communication that does not comply with the stated requirements for an offer are consequently to be treated as merely an invitation to make offers, or an invitation to treat in English law. In addition Article 14(2) of the Convention specifically provides that 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.

As a consequence, it is for the recipient of the invitation to make the actual offer to the first party who then is in the position to either accept or reject the proposal from them.

#### **(c) Counter-offer**

Particular problems arise where a purported acceptance of an offer contains additional or different terms than those proposed in the original offer.

Article 19 provides that:

(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.

(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.

(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.

Consequently under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply will constitute an acceptance. However, even in relation to such non-material alterations, the offeror can object to the new terms as long as they respond without undue delay. If they do not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted by the original offeror for a contract to come into effect.

What will be considered as material alterations are such additional or different terms as relate 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 settlement of disputes.

### **Examiner's solution to Question 6, December 2004 Paper 2.2 GLO**

The UN Convention on Contracts for the International Sale of Goods provides a number of rules that implement the seller's obligations in respect of the quality of the goods. Article 35(1) states that, in general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. As regards quality specifically Article 35(2) provides that, except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used. Goods are not fit under this case where they *lack specific ordinary characteristics* or when they *have defects* which impede their material use. Goods are also unfit for ordinary use when the defects, though not affecting the material use of the goods, *considerably lessen their trade value*.

(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. If the goods in question are to be used for other, non-ordinary purposes the buyer has no rights if he has not indicated the specific use.

(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.

Subparagraphs (a) to (d) apply whenever the parties have not agreed otherwise. If they are not to apply they must be expressly disclaimed in the contractual agreement. Article 35(3) goes on, however, to state that the seller is not liable under subparagraphs (a) to (d) above, if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity. As regards liability, Article 36(1) provides that he remains liable for any lack of conformity which exists *at the time when the risk passes to the buyer*, even though the lack of conformity only comes to the attention of the purchaser after the risk has passed to them.

Where the lack of conformity arises *after the risk has passed to the buyer* the seller remains liable if the lack of conformity arises as a result of a breach of any of the seller's obligations, which include any guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics for a period of time. (Article 36(2)).

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages. (Article 37).

**(b)** Applying the above provisions to the situation in the problem scenario provides the following results.

**(i)** Del's chips

In this case Ari made Del aware of the particular purpose for which he required the chips and Del assured him that his product would be fit for that specific purpose. Consequently Del is in breach of article 35(2)(b) above and Ari may seek remedies for breach of contract against him.

**(ii)** Eve's chips

In this case Ari did not make Eve aware of the special purpose to which the chips were to be put and she did not make any claim as to their suitability for such use. In such circumstances, as the chips are not being used for their ordinary purpose, and as long as they are fit for that ordinary purpose, Ari will not be able to take any action against Del.

**(iii)** Flo's chips

In this instance Flo has failed to comply with article 35(2)(c) as the chips supplied do not match the original model.

Once again Ari will be in the position of being able to seek appropriate remedies against Flo for breach of contract.

**Examiner's solution to Question 7, June 2005 Paper 2.2 GLO**

This question requires an explanation of Article 79 of the UN Convention on Contracts for the International Sale of Goods. Article 79 explains the extent to which an impediment

beyond their control may allow a person to avoid liability for breach of contract and it does so in general terms without making any reference to such terms as are typically to be found in the various domestic systems such as 'hardship', 'force majeure' or 'Act of God'. Instead of such an approach Article 79 sets out a factual description of the circumstances that may excuse failure to perform.

Under Article 79, when a party fails to perform any of his obligations, they are exempt from paying damages where the failure to perform was

- (i) due to an impediment beyond their control; and
- (ii) they could not reasonably have been expected to take that impediment into account when the contract was entered into; and
- (iii) nor could they have avoided or overcome either the impediment or its consequences.

The exemption may also apply if the failure to perform the contract is a result of the action of a third person who was engaged to perform the whole or a part of the contract. However, this exemption only applies where both the party in breach of the contract, and the person whom they engaged, meet the above conditions.

Article 79 only applies to damages and the party in breach may be liable for any other available remedy, including reduction of the price, if the goods were defective in some way.

The exemption provided by Article 79 only applies during the period while the impediment exists and the party who fails to perform must give notice to the other party of the impediment and its effect on their 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, Article 79 does not apply and they are liable for damages resulting from such non-receipt.

The following case provides an example of the operation of Article 79. A contract was entered into between a Russian seller and a German buyer for the supply of chemical products. The goods were not delivered to the buyer within the agreed time and the buyer had to get the chemicals from another source. The buyer sued the seller for breach of

contract, claiming compensation for damages consisting of the difference between the price of the goods established in the contract and the price at which they were obliged to purchase the goods from the third party. The seller maintained that it should be discharged from liability on the grounds that it had been unable to deliver the goods for reasons beyond its control, an emergency at the plant which actually made the chemicals which caused it to halt production.

Referring to Article 79 CISG, the tribunal decided that the seller was unable to prove the facts that would have discharged it from its liability for non-performance of its obligations since refusal on the part of the manufacturer of the goods to supply them to the respondent could not be deemed sufficient grounds for such discharge from liability. The respondent should bear liability for failure to fulfil its obligations on the additional grounds that it was unable to establish that it could not reasonably be expected to take account, in concluding the contract, of the obstacle preventing its compliance with the contract or to avoid or surmount that obstacle or its consequences. (155/1994 of 16 March 1995).