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# THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: REASON AND UNREASON IN THE UNITED KINGDOM

Angelo Forte\*

## I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (UN Convention) was adopted on April 11, 1980 and came into force on January 1, 1989. Although it has been ratified or acceded to by many of the world's major trading economies, several of which, such as Australia, Canada, China, and the United States, are among the United Kingdom's most important export markets, the United Kingdom has remained aloof. The United Kingdom has not been induced to sign even by the fact that the majority of the other Member States of the European Union are signatories. This paper will subject to scrutiny several of the more important reasons which have been adduced either for remaining outside the ambit of the Convention or in support of the contention that accession would pose particular problems for commercial lawyers in the United Kingdom. In short: Would accession be OK for the UK?<sup>1</sup>

It is important for this study to appreciate that the political unit known as the United Kingdom is not governed by a uniform law for its constituent parts. Although legislation is frequently enacted which applies to both England and Scotland, non-statutory law is territorial in its application and administered by different courts in each jurisdiction. The Common Law, as evolved in the English courts, has been exported overseas to many countries and has formed the bedrock of their systems of jurisprudence. Scots private law has been influenced by the Common Law and, particularly since the Act of Union in 1707, English case-law is often looked to as offering examples of possible solutions which might be adopted (or

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1. I cannot claim originality in framing the question in this way. See Lee, *The UN Convention on Contracts for the International Sale of Goods: OK for the UK?*, 1993 J. Bus. L. 131 (1993).

adapted) in Scotland.<sup>2</sup> But Scots private law has also been receptive to legal ideas from outwith the Common Law world. In some areas, particularly, for example, the law of obligations and that of sale (where this has not been the subject of statutory reform), principles derived from Roman Law, as well as from other European legal systems which have been influenced by Roman Law, may still be applied. And Scots law, in common with many other civilian systems, recognizes that legal literature may attain "institutional" status and that, in consequence, it too may be treated as a source of law.<sup>3</sup> Scots law, therefore, may be thought of as a mixed system of law: mixed in the sense that whereas certain principles are derived from the Common Law of England, others have more in common with principles known throughout the Civil Law tradition.<sup>4</sup>

In view of the fact that the UN Convention draws on both of these traditions for the formulation of its provisions, this last observation must be kept in mind. But reference to Scots law in this paper transcends the parochial. Where substantive rules are dealt with, I have tried to use Scots law as reflecting the position within the wider Civil Law tradition, and to illustrate that tensions between Civilian jurisprudence and the Common Law, when found in the one state, pose interesting questions about the fate of the UN Convention in the United Kingdom as a whole. In any case, this juxtaposition allows one to participate in the wider debate about harmonization of international commercial law which the UN Convention continues to generate.<sup>5</sup>

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2. It must not be assumed that the Scottish courts adopt a supine reaction to the citation of English cases. Our courts will not, for example, follow a decision of the House of Lords on a point where the Scottish authorities indicate a different (and more desirable) conclusion. Compare *Barclays Bank plc. v. O'Brien*, [1993] 4 All E.R. 417 (H.L.) with *Mumford & Smith v. Bank of Scotland* 1995 S.C.L.R. 839.
  3. The point is illustrated by the observation of Lord Benholme in *Drew v. Drew*, (1870) 9 M 163, 167: "When on any point of law I find Stair's opinion uncontradicted, I look upon that opinion as ascertaining the law of Scotland." James Dalrymple, Viscount Stair, wrote *THE INSTITUTIONS OF THE LAW OF SCOTLAND* in 1681. Examples of foreign writers whose views have had influence in Scotland are *DOMAT, TRAITE DES LOIX: LES LOIX CIVILES DANS LEUR ORDRE NATUREL* (1689) and *POTHIER, TRAITE DES OBLIGATIONS* (1761).
  4. There is a convention, best left to comparatists to debate, that the other "mixed" legal systems, are Louisiana, Quebec, and South Africa. There is, of course, a sense in which all legal systems can be regarded as mixed. But the term is usually taken to signify a system in which both the Common Law and the Civil Law inform the substantive law of the state.
  5. In the interest of brevity, crucial aspects of this debate are conveniently

## II. APPLE PIE AND THE HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW

Why do bodies such as UNCITRAL, UNIDROIT, or the ICC strive to achieve the harmonization of international commercial law? Annex 1 to the UN Convention provides both an economical and accurate answer to the question:

[T]he 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.<sup>6</sup>

Statements of this sort are articulations of an ideal that is easy to subscribe to in principle. With specific reference to the UN Convention, one may be precise and say that it should be adjudged acceptable on two counts, namely: (1) it provides a set of neutral rules applicable to international contracts for the sale of goods; and (2) it represents a compromise between Common and Civil Law principles of sale. To these it might be added that the Convention has not attempted to address certain issues, such as the passing of property, on which the gulf between the two traditions is too wide to be bridged at present.<sup>7</sup> There is an element of calculated considerateness here which has facilitated the speed with which the Convention has been accepted. But while the above factors may represent ideal reasons for ratification, we must allow, while resisting the temptation to prejudge, that such ideals may be anathema in some jurisdictions. To the outside observer, and possibly to the American lawyer in particular, it may seem curious that the United Kingdom has given every appearance of steadfast refusal to ratify the UN Convention. The picture is, however, more complex than it might at first seem.

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grouped in one place. See CRANSTON & GOODE, *COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS*, ch. 1-3 (Oxford 1993) [hereinafter CRANSTON & GOODE].

6. For the text of the convention see 19 *INTERNATIONAL LEGAL MATERIALS* 668 (1980).

7. Goode, *Reflections on the Harmonization of Commercial Law*, in CRANSTON & GOODE *supra* note 5; see also IX *UNCITRAL Y.B.* 102-04 (1978).

### III. IDEOLOGICAL DIFFERENCES: A TALE OF TWO LAW COMMISSIONS

Responsibility for ensuring that English and Scots law develop in a systematic manner consistent with modern needs and, where appropriate, in unison, rests with the Law Commission and the Scottish Law Commission (SLC) respectively.<sup>8</sup> In recent years the two Commissions co-operated to produce a joint report which led to reform of the law on contracts for the sale of goods in the United Kingdom,<sup>9</sup> but a recent suggestion, made by the Scottish Law Commission, for collaboration in reforming certain aspects of the law on the formation of contracts was rebuffed.<sup>10</sup> One of the reasons given by the Law Commission for its refusal, was that it wished to see whether the United Kingdom would ratify the UN Convention: a curious abnegation of responsibility by a body whose remit is to be proactive. However, in my opinion, an equally important reason for this lack of willingness to engage with contract formation rested on a reluctance to interfere with that cardinal feature of English contract law — the doctrine of consideration.

In a report published in 1993, the Scottish Law Commission recommended the promulgation of legislation which would specifically alter domestic law on the conclusion of contracts by non-instantaneous means.<sup>11</sup> What is proposed is that change should be based on those articles of the UN Convention dealing with the formation of contracts.<sup>12</sup> But the choice of this particular model does not simply reflect a desire to alter a rule of domestic law, that could have been done in other ways. The Convention was chosen, in my view, because it offers other advantages besides a convenient restatement of certain principles of contract law. Just what these benefits are is best left to the *SLC Report* to describe:

[T]he Convention offers a modern, internationally agreed

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8. See Law Commissions Act of 1965, ch 22, § 3(1) (1965).

9. See LAW COMMISSION, SALE AND SUPPLY OF GOODS (1987).

10. See *Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (1993), Scot. Law Com. No. 144, para. 1.5 [hereinafter *SLC Report*].

11. In relation to contracts concluded by post, Scots and English law adhere to the expedition principle; that is, that a contract is concluded when the acceptance is posted. Where parties are in instantaneous communication, however, a contract is concluded when the acceptance reaches the offeror; thus, the reception principle is applied. But which rule applies to contracts concluded by electronic data interchange?

12. See *SLC Report supra* note 10, para. 1.10. The articles are 4, 6, 8-10, and 13-24.

set of rules on the formation of certain contracts.<sup>13</sup> These rules now apply very widely in international trade. Given that Scots law has a tradition of being receptive to the best international legal developments, given the obvious advantages for Scottish traders, lawyers and arbiters in having our internal law the same as the law which is now widely applied throughout the world in relation to contracts for the international sale of goods, and given the sensible tradition in Scotland of not having different rules for the formation of contracts of different types, it seemed to us that it would be worth considering whether the more general rules of contract formation in the Vienna Convention could be adopted as part of the general law of Scotland on the formation of contracts. . . . [W]e reached the . . . conclusion that they would form a very satisfactory basis for the internal law of Scotland in this area.<sup>14</sup>

Although the above call for change is apparently based on a number of legal cultural stimuli, such as Scottish responsiveness to international developments and the desirability of having a uniform set of rules of general application to contract formation, the underlying reason for change is a market-oriented one. Scotland is a small jurisdiction and its laws, judicial system, and legal profession are an unknown quantity to many foreign businesses. These are classic reasons for not choosing the law of any small country as the proper law of an international contract for the sale of goods, or for arguing that Scots law does not govern the contract and that its courts have no jurisdiction to hear a dispute. But, if the Scots law on formation of contracts for the sale of goods were to be that set out in the UN Convention, and thereby constitute a neutral system of law, then, litigation or arbitration in Scotland might not seem so unattractive and that, of course, would be good for the business of the law. This awareness of the benefits which enure where a small jurisdiction participates in an international commercial law regime, is to be seen in the case of arbitration. In 1989 the Mustill Committee recommended that the UNCITRAL Model Law on International Commercial Arbitration should not be adopted in England;<sup>15</sup> the

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13. The Sale of Goods Act 1979 (c 54) is not comprehensive. Contract formation and contractual capacity are regulated by the general law of contract.

14. *SLC Report*, *supra* note 10, para. 1.7.

15. See DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW: A REPORT ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, paras.

Dervaird Committee came to the opposite conclusion in Scotland<sup>16</sup> and, in consequence, legislation was passed which enacted the Model Law as part of the law of Scotland.<sup>17</sup> Even the very technique proposed by the Commission to implement its recommendation that certain provisions of the UN Convention be made part of Scots law<sup>18</sup> follows the modern United Kingdom practice of appending the text of a convention as a schedule to the statute giving effect thereto.<sup>19</sup>

In the context of the more general debate concerning the harmonization of contract law, two points have been made with regard to the role of international regimes. The first of these suggests that opposition to attempts at international harmonization is less likely when the international regime is not perceived as a threat to indigenous rules applied in the national context.<sup>20</sup> The second, if I understand it correctly, argues that the UN Convention would be an unlikely model for a national legislator to adopt if its prime concern were simply to readjust the domestic law of sale of goods. However, the converse might be true where the intention of the national legislator is to reform its domestic law specifically in the context of international trade.<sup>21</sup> If one accepts that these views accurately reflect national attitudes towards attempts to harmonize commercial law,

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89-90 (1989).

16. See SCOTTISH ADVISORY COMMITTEE ON ARBITRATION LAW: A REPORT TO THE LORD ADVOCATE ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1989).
17. See Law Reform (Miscellaneous Provisions) (Scotland) Act of 1990, ch. 40 (1990). The Arbitration Act of 1996 has, however, sought to approximate English law with that in the Model Law. For an examination of the extent to which this has been achieved, see Davidson, *The New Arbitration Act - A Model Law?*, 1997 J. Bus. L. 101 (1997).
18. See *SLC Report*, *supra* note 10, para. 1.10.
19. International conventions are not self-executing in the United Kingdom. In addition to the Law Reform (Miscellaneous Provisions) (Scotland) Act implementing the UNCITRAL Model Law on International Commercial Arbitration, see, e.g., Civil Jurisdiction and Judgments Act of 1982, ch. 27, as amended by Civil Jurisdiction and Judgments Act of 1991, ch. 45 (Lugano Convention); Contracts (Applicable Law) Act of 1990, ch. 36 (Rome Convention); Merchant Shipping Act of 1995, ch. 21 (*inter alia*, the London Salvage Convention).
20. See Goode, *Reflections on the Harmonization of Commercial Law*, in CRANSTON & GOODE, *supra* note 5, at 13-14.
21. See Hellner, *The UN Convention on the International Sale of Goods: Its Influence on National Sales and Contract Law*, in CRANSTON & GOODE, *supra* note 5, at 43.

and they certainly appear convincing in the United Kingdom context, then what we find in the *SLC Report* is evidence of a psychology which is not only receptive to international ideas but which is also responsive to international ideals. The UN Convention not only postulates rules for the formation of contracts which are suited to Scots law, but it also generates the conviction that Scots law must be responsive to the needs of international commerce. As the *SLC Report* states: "we see [our] recommendations as an important step towards, and not away from, international harmonization of laws on contract formation."<sup>22</sup> So much, then, for Scottish perceptions of the UN Convention. But Scotland is not an independent State and cannot ratify the UN Convention. If this is to be done, then, currently, it must be with the support of English lawyers. What is their attitude to the UN Convention?

#### IV. ENGLISH LAW: SELF-INTEREST AND PARANOIA

Harmonization of international trade law is always a fraught process. Lawyers, comfortable with the intellectual baggage which represents their own legal system's rules, are naturally predisposed to press the case for harmonization in terms which are as familiar to them as possible. That is understandable. But the UN Convention appears to have touched many, though by no means all, English lawyers in a deeply disturbing way. The UN Convention has come to represent a source of "traps" into which the unwary English lawyer will fall if utmost vigilance is not maintained. To the outside observer these attitudes seem paranoid. How did it all start?

In 1980 the Department of Trade and Industry solicited views from interested parties as to whether or not the United Kingdom should ratify the UN Convention. The Law Reform Committee of the Law Society of England and Wales<sup>23</sup> responded with a very negative view and recommended non-ratification.<sup>24</sup> Broadly speaking, one can identify two strands in their argument for rejection. The

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22. *SLC Report*, *supra* note 10, para. 1.5.

23. The Law Society is the professional body which represents the interests of solicitors in England and Wales. Scottish solicitors are represented by the Law Society of Scotland. Both bodies are regularly consulted by the Law Commissions, the Department of Trade and Industry, and the Treasury about law reform proposals.

24. I am indebted to Mr. Michael Clancy, Deputy Secretary, Law Reform, Law Society of Scotland, and to Mr. Charles Maggs, Policy Directorate, The Law Society, for providing me with a copy of the comments made by the Law Reform Committee in reply to the DTI's 1980 inquiry [hereinafter *LRC Report*].

first, settled on the fact that there were differences between the domestic law of sale and the UN Convention:

On the merits of the revised uniform law adopted in the 1980 Convention, we do not wish to exaggerate the differences from the provisions of UK law (the Sale of Goods Act). There are, however, certain differences which are not altogether insignificant and we think they are not such as to make the uniform law more attractive to traders than the existing UK law. Moreover they have the inherent disadvantage that even slight changes of wording from that in the Sale of Goods Act result in losing the benefit of the certainty conferred by long-established case law on the interpretation of the Act.<sup>25</sup>

Here the UN Convention is perceived as a threat to domestic law on sale of goods. But if this is so, and bearing in mind that the Convention is an attempt at harmonization of the law of sale in an international context, criticism of it only has cogency if domestic law is itself seen as being appropriate in the non-national context. More precisely, the criticism only has force if *English* law, as the proper law of contracts for the international sale of goods, and *English* courts, as the appropriate *fora* for the resolution of disputes, are threatened by the UN Convention. And this Anglo-centric view, so it seems to me, represents the second strand of the Law Reform Committee's argument against ratification:

If the Convention were ratified by the UK and . . . came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country.<sup>26</sup>

There is most definitely a self-perception that English law is a world brand-name and that those entrusted with its adjudication should be careful not to do anything which might jeopardize that position.

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25. *LRC Report*, *supra* note 24, para. 4.

26. *Id.* para. 8. It will be observed that the unfortunate habit of foreigners referring to the United Kingdom as "England" has its counterpart in the equally unfortunate habit of the frequent English equation of England with the "United Kingdom." The equation is plainly seen in this paragraph of the Committee's response.

A particularly good example of this attitude is to be seen in the decision of the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.*<sup>27</sup> There it was held, overruling an earlier decision by the House,<sup>28</sup> that judgments by English courts could be given in a foreign currency and not only in sterling.<sup>29</sup> The fear was that if the change was not made, England would cease to be an attractive jurisdiction in which to have disputes revolved. With reference to this case, Lord Kerr made this telling observation:

Foreigners have confidence in our legal system. But they no longer have confidence in sterling. They can now continue to contract in stabler currencies, but continue to come here for the resolution of their disputes, without the danger of having to accept payment in sterling at a devalued rate.<sup>30</sup>

It was fear of this sort which underwrote the objections of the Law Reform Committee to ratification of the UN Convention: The Committee added as a rider that, if the UN Convention were to be ratified, the government should make declarations under articles 94 and 95.<sup>31</sup> Consequently, under article 94, the United Kingdom would disapply the UN Convention in the case of contracts made between a party having its place of business here and one with its place of business in either another Contracting State or non-contracting State, as long as both states had the same or very similar rules to those found in the UN Convention. And the UN Convention's scope would be further cut down by article 95 which disapplies its application as the proper law of a contract of sale under article 1(1)(b).

Article 1(1)(b) has been described as creating a "trap for the unwary."<sup>32</sup> It is difficult to see, however, just why this provision is perceived to be a trap. The import of the provision is clear: the UN Convention may come into play by virtue of the rules of private international law. But it may be disapplied by the contracting parties

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27. [1976] A.C. 443.

28. See *Re United Ry. of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007.

29. Arbitrators were already making awards in the currency of account. On this occasion Scots law followed suit in *Commerzbank Aktiengesellschaft v. Large*, 1977 S.C. 375.

30. Kerr, *Modern Trends in Commercial Law and Practice*, 41 MOD. L. REV. 1, 10 (1978).

31. See *LRG Report*, *supra* note 24, para. 10.

32. Lee, *supra* note 1, at 133-34.

themselves so long as this is done timeously.<sup>33</sup> Despite this, there is a fear that an "unsuspecting English business will . . . find itself taken by surprise and unexpectedly [be] subject to the Convention."<sup>34</sup> If the sole criterion for objecting to the application of the UN Convention by this means rests on the fact that a business party, or its legal adviser, may be surprised by the outcome of a contract, then, most rules of domestic law, statutory or otherwise, must be adjudged unfair. Legislation in the United Kingdom is not promulgated with a warning attached to it that it may contain unpleasant surprises for the unwary! Law reports are not sold to the public in newsagents' shops! It is the business of the commercial lawyer when drafting a contract for the sale of goods, whether that contract is to be used within the United Kingdom or without, to use his or her knowledge of the law governing that contract in order to avoid pitfalls.

I would suggest that the real objection to article 1(1)(b) is that it extends the application of the UN Convention and would thereby oust English law as the proper law of the contract in many cases. Were the United Kingdom to accede, a dispute between an English business and one located in a non-contracting State would still be governed by the UN Convention if the rules of private international law pointed to English law as the proper law of the contract. In the Letter of Submittal by the Secretary of State to the President of the United States, the reason stated for the recommendation that a declaration should be made under article 95 was this:

If United States law were seriously unsuited to international transactions, there might be an advantage in displacing our law in favor of the uniform international rules provided by the Convention. However, the sales law provided by the Uniform Commercial Code is relatively modern and includes provisions that address the special problems that arise in international trade.<sup>35</sup>

In part, I think that the American attitude may reflect the fact that various provisions of the Uniform Commercial Code are departures from the Common Law and, in some instances, it is closer to the

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33. See UN Convention, art. 6.

34. Lee, *supra* note 1, at 134.

35. GLASTON & SMIT, INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS App. 1.4 (1984).

Civil Law tradition. This cannot be said of English Law and may explain why English lawyers would wish, should the UN Convention ever be adopted, to cut down the scope of its application wherever possible.

Another provision of the UN Convention which is seen as a trap is article 16(2)(a). This provides that an offer is irrevocable "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable." Under Scots law, which reflects the civilian principle that obligations are consensual and do not require to be supported by consideration, this provision causes no problem as to its enforceability. A unilateral obligation may be created by a promise, and words of promise adjoined to an offer to purchase, that the offer cannot be revoked before a stated time, bind the offeror accordingly.<sup>36</sup> The only real issue here, so far as Scots law is concerned, is drawing a distinction between wording which obliges the offeror not to revoke before the expiry of a stated time and that which obliges the offeree to accept within a stated time, but which does not prevent the offeror from withdrawing within that time. For Scots law the issue is one of construction only.<sup>37</sup> In contrast, although English law can enforce an irrevocable offer (which it terms a "firm offer"), it will only do so if two conditions are satisfied, namely: (1) consideration must be given in return;<sup>38</sup> and (2) the promise not to revoke must be expressed as such.

Both English law and Civil Law tradition adopt entrenched views on firm offers. Under English law, statement of a fixed time for acceptance, without specific words of promise that the offer will not be revoked within that time, "is no more than an indication that after that time the offer, unless revoked meanwhile, will lapse."<sup>39</sup> Within the Civil Law tradition, such a statement indicates that the offer is irrevocable. These are polarized views, and unsuccessful attempts were made at the Vienna conference to ensure that

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36. See *Littlejohn v. Hawden*, 20 S.L.R. 5 (1882); *Patterson v. Highland Ry. Co.*, 1927 S.C. (HL) 32, 38.

37. Where an offer stated that the offeree had an offer at a stated price "for ten days from this date" this was construed as a promise not to withdraw the offer within the ten day period. See *Littlejohn v. Hawden*, 20 S.L.R. 5 (1882). An offer "made on condition of acceptance within three days" has been held to be revocable. See *Heys v. Kimball & Morton*, 17 R. 381 (1890); see also *Effold Properties Ltd. v. Sprott*, 1979 S.L.T. (Notes) 84.

38. See *Dickinson v. Dodds*, 2 Ch. D. 463 (1876).

39. Nicholas, *The Vienna Convention on International Sales Law*, 105 L. Q. REV. 201, 215 (1989).

the wording of article 16(2)(a) reflected the partisan view of the Common Law in preference to that of the Civil Law and *vice versa*.<sup>40</sup> It has been suggested that the UN Convention must be regarded as ambiguous on this point and that the ambiguity creates another trap.<sup>41</sup> But this is a curious sort of ambiguity, for it is premised on the view that the provision adopts neither the position under English law nor that under Civil Law. There is no ambiguity here, there is a compromise. Presumptions, English or Civilian, have been displaced by a requirement that the effect of a term in an offer, stating a time for acceptance, is a matter of construction.<sup>42</sup> The approach adopted by the UN Convention is the one already followed by Scots law and it is one which has caused no difficulty.<sup>43</sup> If article 16(2)(a) means that commercial lawyers engaged in drafting international contracts for the sale of goods need to keep their wits about them, and to choose their words with a view to achieving their desired result, they are not being asked to do something special, merely to do their jobs.

Article 7(1) establishes three principles which reflect the basic philosophy of the UN Convention and which must underlie interpretation of its provisions. Accordingly, in construing the Convention, account must be taken of: (a) its international character; (b) the need to promote uniformity; and (c) the observance of good faith in international trade. While accepting that interpretation of the UN Convention, particularly with a view to achieving its uniform application, will not always be easy, one has to avoid overstating the difficulties. Nicholas,<sup>44</sup> for example, asks if national courts will look at *travaux préparatoires*. The short answer to this is yes. In the context of international carriage conventions, the House of Lords has certainly considered that cautious reference to *travaux préparatoires* may be appropriate.<sup>45</sup> And, in certain instances, legislation implementing international conventions may specifically enjoin British

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40. *See id.* The players were the United Kingdom and West Germany.

41. *See id.*

42. As a matter of construction, the principles in article 8 would come into play.

43. *See SLC Report*, para. 3.15.

44. *See* Nicholas, *supra* note 39, at 209.

45. *See* Fothergill v. Monarch Airlines Ltd., [1981] A.C. 251; Sidhu v. British Airways plc., [1997] 1 All E.R. 192; *see also* Gatoil Int'l Inc. v. Arkwright-Boston Mfrs. Mut. Marine Ins. Co., 1985 S.C. (HL) 1. The note of caution is emphasized by Debattista, *Carriage Conventions and their Interpretation in English Courts*, 1997 J. Bus. L. 130 (1997). I would not disagree entirely with his view that the English courts have tended to interpret conventions in much the same way as

courts to have regard to the *travaux préparatoires*.<sup>46</sup> In interpreting the Lugano Convention our courts are also *required* to take notice of principles established in the courts of other States Parties and are free to consider academic literature on the subject.<sup>47</sup> Against this background I would suggest that it is extravagantly disingenuous to insist that interpretation of the UN Convention will pose problems of a particularly acute nature for English (or Scots) lawyers. It has, for example, been said that not only does the UN Convention, in some places, lack the “degree of detail and precision in the drafting” which English lawyers have come to expect (which probably asks us to equate precision with intelligibility and to accept that the *casus omissus* is unknown), but that “the common lawyer will be used to narrow judicial interpretation based on the literal language of the text.”<sup>48</sup> This last statement is simply wrong. It is inaccurate both in its portrayal of the approach taken by courts in the United Kingdom to the interpretation of domestic legislation, and in its implication that the technique it describes is applied in the interpretation of international conventions regulating rights between private parties. So far as domestic statutes are concerned, our courts have jettisoned the already eroded “strict constructionist” approach in favor of a more “rationale-oriented” or “purposive” analysis.<sup>49</sup> In respect of domestic legislation, the objective which Parliament intended to achieve must be sought for and, in so doing, “[m]eticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to [a] purposive approach.”<sup>50</sup> In the interpretation of international carriage rules and conventions, abandonment of the strict construction may almost be described as an article of judicial policy as the following statement illustrates:

The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is

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they do domestic legislation. I think, however, that he underplays the extent to which the approach to construction of the latter has changed.

46. See *supra* note 19.

47. See Civil Jurisdiction and Judgments Act of 1982, ch. 27, § 3B(1), (2). See generally *Bank of Scotland v. Seitz*, 1990 S.L.T. 584.

48. Lee, *supra* note 1, at 147.

49. See *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593.

50. *R. v. National Ins. Comm'r*, [1972] A.C. 944, 1005 (opinion by Lord Diplock).

addressed to a wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted . . . unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.<sup>51</sup>

Even the requirement of good faith, an underdeveloped aspect of both English and Scots law, is not an unknown concept in either system.<sup>52</sup>

That there exists a problem in achieving uniform application of the UN Convention is a statement of the obvious.<sup>53</sup> It is a problem which our judiciary have acknowledged already in dealing with the interpretation of other conventions. It is a problem to which they have found solutions. Interpretation of the UN Convention would pose no greater difficulties for judges and lawyers in the United Kingdom than it already does for their counterparts elsewhere. It is a fallacy to think that they are not equal to the task.

#### V. "THIS TIME WE ALMOST MADE IT — DIDN'T WE?"

In 1989 the Department of Trade and Industry published a *Consultative Document* and, once again, asked for views on the desirability of accession by the United Kingdom.<sup>54</sup> The *Consultative Document* itself identified three advantages which accession might bring. First, it was argued that uniformity in international sales law was desirable and that the Convention's rules would constitute "common ground"

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51. *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251; see also *The Morviken*, [1983] 1 Lloyd's Rep. 1; *Egon Oldendorff v. Libera Corp.*, [1996] 2 Lloyd's Rep. 380; *Sidhu v. British Airways plc.*, [1997] 1 All E.R. 192. For a specific rebuttal of Lee's statement, and for a view which advocates a balanced approach, see *Buchanan & Co. v. Babco Forwarding & Shipping (UK) Ltd.*, [1978] 1 Lloyd's Rep. 119, 123 (opinion by Lord Wilberforce).

52. See, e.g., Bills of Exchange Act of 1882, ch. 61, §§ 29(1)(b), 30(2), 90; Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994 No. 3159, reg. 4, Sch 2.

53. The issue is, nonetheless, important. See HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* (2d ed.); Del Duca, *Developing Transnational Harmonization Procedures for the Twenty-first Century*, in CRANSTON & GOODE, *supra* note 5, at 38-40.

54. See DEPARTMENT OF TRADE INDUSTRY, *UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A CONSULTATIVE DOCUMENT* (1989) [hereinafter *DTI Consultative Document*]. Part Two of this document is based on Professor Nicholas's article in 105 L. Q. REV. 201 (1989). Professor Nicholas assisted the DTI in its preparation.

on which business might be transacted.<sup>55</sup> Second, it was thought that a uniform law might reduce the time-consuming and costly litigation often needed in order to determine, as a preliminary issue, what the proper law of a contract is.<sup>56</sup> Third, accession would allow courts and arbitrators in the United Kingdom to have a market share in the resolution of disputes under the UN Convention and to participate in the evolution of its jurisprudence.<sup>57</sup> Both Law Commissions recommended accession.<sup>58</sup> So did the Law Society of Scotland. The reaction of the English legal profession was crucial.

The Commercial Law Sub-Committee of the City of London Law Society, a body representing the constituency most likely to be affected by accession, recommended that the United Kingdom should accede.<sup>59</sup> The change in perception between this document and the 1981 submission is quite radical. English commercial law was no longer viewed as the *de facto* proper law of international trade. Moreover, the experience and impartiality of English judges and arbitrators would still ensure that the City of London would remain as a world center for the resolution of international commercial disputes. But that expertise would be harmed by non-accession. The problems identified by Nicholas were not considered to be serious enough to outweigh the advantages of accession. The Committee did, however, recommend that on accession the United Kingdom should make a declaration under article 95.

All that was almost a decade ago. Nothing has happened since. The United Kingdom remains aloof. There simply seems to be no widespread support for accession among English commercial lawyers. The Law Society recently carried out a survey of City solicitors' firms to gauge what the current feeling about the UN Convention was. There was a poor response rate and the margin in favor of ratification was very slim.<sup>60</sup>

## VI. CONCLUSION

Contemporary attitudes in the United Kingdom to the UN Convention vary. Some English observers subscribe fully to the "No Surrender" attitude typified by criticism of the UN Convention as "a

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55. See *DTI Consultative Document*, *supra* note 54, part 1, para. 31.

56. See *id.* para. 32.

57. See *id.* para. 33.

58. See *SLC Report*, *supra* note 10, para. 1.7.

59. Once more, I am indebted to Mr. Charles Maggs for supplying a copy of this submission which was made in either 1989 or 1990.

60. I owe this information, again with thanks, to Mr. Charles Maggs.

further erosion of our own excellent municipal law."<sup>61</sup> Others accord it only grudging acceptance: the UN Convention is "probably as good as can be expected."<sup>62</sup> On the side of the angels, however, are the Department of Trade and Industry and, most eloquently, the Scottish Law Commission, to which may be added the voice of Professor Roy Goode.<sup>63</sup> In common with many other Scottish commercial lawyers, and, in part, on the basis of the arguments in this paper, I too am in favor of accession. It would seem to be the case, however, that a lethal combination of antipathy and apathy have ensured that the government of the United Kingdom will do nothing until the English legal profession actively presses for change. Only the United Kingdom can accede to the UN Convention. The recommendation that the contract formation provisions of the UN Convention be enacted for Scotland has not yet been accepted. With regard to the United Nations Convention on Contracts for the Sale of Goods, a measure intended to promote harmony, the United Kingdom is a disunited kingdom.

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61. D. Wheatley Q.C., *Why I Oppose the Winds of Change*, THE TIMES, March 27, 1990; see also Hobhouse J., *International Conventions and Commercial Law*, 106 L. Q. REV. 530 (1990).

62. Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. BUS. L. 346 (1981). Nicholas, *supra* note 39, at 243, concurs with Feltham's assessment under deletion of the word "probably." I think that Lee, *supra* note 1, at 149, also falls into this grudging acceptance category.

63. See Goode, *Why Compromise Makes Sense*, THE TIMES, May 22, 1990 (a riposte to Wheatley).