

CORPORATE BULLETIN

July 2004

CROSS BORDER SELLING AND THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS

Introduction. If you are buying or selling goods to other businesses across international borders, the United Nations *Convention on Contracts for the International Sale of Goods* (the “Convention”) may govern your relationship with your purchasers or suppliers. The Convention is different from the more familiar Canadian and American laws that govern the sale of goods and automatically applies to a broad range of agreements for the purchase and sale of goods. As such, it should be a serious consideration when doing business abroad.

What is the Convention? The Convention, which consists of 4 parts and 101 Articles or Sections, was introduced by the United Nations in 1988 in order to promote international trade and foster certainty in international commercial relationships by overcoming differences in law between different states. It applies to commercial contracts for the sale of goods, or to contracts for services where the sale of goods is a major component of the contract, between businesses located in countries that have adopted the Convention (“Member States”). It also applies to any individual sales made under an existing distribution agreement. The Convention does not apply to goods for personal or household use, shares or other forms of securities.

The Convention differs from Canadian commercial law in several interesting and significant respects:

- The Convention does not require contracts to be in writing. If you do not exclude the application of the Convention and are contracting with a party in a Member State, any oral agreement between you may be binding.
- Parties are permitted to read “usages” and “practices” into the performance of contractual obligations, rather than simply relying on the written contract.
- A buyer can sign back an offer and include non-material variations without those variances constituting a counter-offer. As a result, the seller will be bound by the varied terms without having negotiated them.
- The Convention requires buyers to inspect goods and reject any non-conforming goods within a short (though undetermined) time frame. Failure to do so will limit a buyer’s ability to return the goods, claim damages or obtain a rebate in the cost.
- Suppliers may be able to suspend their performance under a contract if it becomes apparent that a buyer cannot or will not be able to perform a substantial part of its contractual obligations.
- The Convention imposes the “fit for purpose” standard rather than the Canadian standard of “merchantability”. “Fit for purpose” is generally presumed to mean that goods must meet a particular quality, quantity or description. If a supplier provides a sample, to be “fit for purpose”, the goods supplied will likely have to match the quality of the sample.
- The Convention imposes a positive obligation on parties to contract in good faith.

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Although the Convention differs from the various Canadian laws relating to the sale of goods and from the American Uniform Commercial Code (“UCC”), it closely resembles the UCC.

The Convention:

- promotes uniformity but allows parties the freedom to mould their contracts outside the Convention’s presumptions;
- is generally fair and does not overly favour one party (vendor or purchaser) over the other; and
- is reasonably well drafted and successfully reflects international business expectations.

Canada adopted and ratified the Convention by passing the *International Sale of Goods Convention Act* in 1991 and each of the Canadian Provinces and Territories has subsequently passed legislation adopting the terms of the Convention. As a result, the Convention’s regime is the *automatic* or *default legal regime* that governs the international sale of goods between businesses in Canada and businesses in any other Member State unless application of the Convention is specifically excluded. To date, there are 60 other Member States, including the United States and Mexico, making the Convention a major legal consideration for any importer or exporter. However, despite its already significant history and its broad application, few Canadian businesses use this little understood legal regime to govern their contractual relationships.

When selling goods or services abroad consider the following:

1. **Come to Terms with the Convention** – As mentioned earlier, the Convention is not widely used in Canada but may be a wise alternative to Canadian law. With its widespread application, and its increasing use by European merchants, Canadian businesses may find themselves at a disadvantage when trading abroad if they are not at least familiar with the terms and requirements it sets out. Moreover, as the European Union continues to strengthen its member’s markets, negotiating out of having the Convention apply may become increasingly difficult. As such, understanding the Convention better will only benefit you and should help you negotiate and draft your commercial agreements.
2. **Opting Out** – The Convention automatically governs contracts between Member States unless expressly excluded. If you do not want your contract to be subject to the Convention’s rules, be sure that any contract you draft or sign specifically and expressly excludes it.
3. **Be Specific** – The Convention can be partially excluded. If you do not opt out but do not want all of the automatic presumptions of the Convention to apply, be as specific as possible in drafting your contract. The Convention is very thorough and is designed to provide dependable solutions for circumstances or factors not specifically addressed by the parties. While this may offer a distinct benefit in many cases, where you have turned your mind to something specific that differs from the Convention’s rules, it will be important to capture that intent in your contract.
4. **Consider the Conventions Advantages** – The Convention is designed to promote certainty and make international transactions much simpler for merchants with high volume international trade with a number of countries. Decide whether having the convention govern all of your contracts will create greater certainty for your business and act accordingly. If your business is primarily between Canada and US, there may be no real advantage, particularly if your relationships are well established or you are very familiar with the market. However, whether your operations are based in Canada or the US, if you have international purchase or sales channels that you regularly use, there may be some advantages to relying on the Convention to govern you contracts.

Despite the possible opportunities and advantages the Convention may offer, in Canada the Convention is still unfamiliar to many lawyers and business people and is largely untested. This unfamiliarity may initially increase the transactional costs associate with forming contracts and any dispute resolution proceedings.

Regardless of whether you choose to use the Convention's rules to govern your contracts for the purchase and sale of goods (and in certain circumstances services) or not, it is important to be aware of its application and make an appropriate business decision in this regard.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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