The courts, however, can cooperate in the enforcement of trademark laws by seeing to it that speedy justice is rendered. Time is often of the essence in commercial concerns. Thus, courts should keep themselves abreast of current developments in trademark law as well as emerging trends in commercial practice. In so doing, however, courts should not lose sight of the two themes earlier adverted to — the proprietary character of trademarks, tradenames, and service marks, and the prohibition of unfair competition.

CONTRACT FORMATION UNDER THE VIENNA SALES CONVENTION: REFLECTIONS FOR THE PHILIPPINES

DANTE MIGUEL V. CADIZ, LL.M. AND JOAQUIN L. GONZALEZ III, PH.D.*

In international trade relations, divergent national laws governing sales transactions hamper the fluidity of trade between countries. In view of the fast paced trade environment, significant economy and convenience for contracting parties can result from having clear-cut rules and legal certainty.

As early as the 1930's, efforts to advance uniform laws to govern the international sale of goods had been initiated in order to stimulate trade between countries. More recently, in 1980, the United Nations sponsored a conference in Vienna on the International Sale of Goods. Needless to say, the success of its brainchild, the Uniform Law for International Sales, will depend on the extent of cooperation and participation that it will engender.

The Philippines is currently not a signatory to the said Uniform Law. However, it can decide to submit an instrument of adherence to the UN Secretary-General indicating an intent to participate, and the extent of such participation. From this standpoint, the significance of this legal article becomes apparent.

By a detailed presentation of the formation of the contract of sale proposed by the convention and its comparison with the prevailing Philippine law on sales, this article will examine what modifications would be entailed by a subscription to the Uniform Law for International Sales.

I. HISTORICAL BACKGROUND OF THE CONVENTION

In the 1930's, the International Institute for the Unification of Private Law (UNIDROIT) requested a distinguished group of European scholars to prepare a draft of a uniform law for the international sale of goods.[1]

* Both authors are with the Policy Research Department, The World Bank, Washington, D.C., U.S.A. However, the views expressed in this study are entirely the authors and should not be attributed in any manner to the World Bank or any of its affiliated institutions.

1 JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 5 (2nd Ed., 1991).

Two related drafts had been prepared. In April 1964, a diplomatic conference attended by 28 states met at Hague to act on said drafts. This resulted in the formulation of two conventions: Uniform Law for the International Sales of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[2] In 1972, both Conventions went into effect following ratification by five States.[3]

The 1964 Sales Convention were of fundamental value, but the conviction grew that success on a worldwide scale called for worldwide participation and sponsorship.[4] Consequently, in 1966, The United Nations passed a resolution which provided for the establishment of a body known as the United Nations Commission on International Trade Law (UNCITRAL), a worldwide representative body which seeks to promote "the progressive harmonization and unification of the law of international trade."[5] In 1968, the UNCITRAL established a working group of 14 states to prepare a uniform law for international sales.[6] In 1978, the Working Group finished a Draft Convention on Contracts for the International Sale of Goods.[7]

The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna from 10 March to 11 April 1980.[8] Representatives of 62 States and 8 international organizations attended the conference.[9] Two committees were formed: one charged with the preparation of the substantive provisions of the Convention (Articles 1-88), the other with the preparation of the final clauses (Articles 89-101).[10] At the end of the Conference, the texts prepared by the two committees were voted on in Plenary session; the Convention as a whole was then submitted to a roll-call vote and was approved without dissent.[11]

---

[2] C.M. BIANCA, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987).

[3] *See* HONNOLD, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *See* BIANCA, *supra* note 2 at 6.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

II. FORMATION OF CONTRACTS IN GENERAL

A. Adoption of the Traditional "Offer and Acceptance" Sequence by the Convention

The Uniform Law for International Sales under the 1980 United Nations Convention (hereafter the "Convention") has adopted the traditional "offer and acceptance" sequence as building blocks for the formation of contract.[12] The premise is that these manifestations of assent can be identified in the long process of negotiations in which the parties approach each other, step by step, until they have reached an agreement.[13] Under the Convention, a contract is concluded at the moment when an acceptance of an offer becomes effective.[14] An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.[15]

There has been no lack of criticism of this traditional concept of contract formation and its retention in the Convention.[16] The main criticism is that reliance on the external process of establishing a consensus cannot adequately cover situations where there is no doubt about the parties' agreement, even though it did not result from an identifiable offer followed by a concurring acceptance.[17]

B. Applicability of the Convention Beyond Contract Formation

Article 4 of the Convention provides:

> *This Convention governs only the formation of the contract of sale* and the rights and obligations of the seller and buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold. (Emphasis supplied)

---

[12] PETER SCHLECHTRIEM, UNIFORM SALES LAW (Dr. Peter Doralt & Dr. Helmut H. Haschek, eds., 1986).

[13] *Id.*

[14] United Nations Convention on Contracts for the International Sale of Goods, art. 23. [hereinafter cited as Convention.]

[15] *Id.*, art. 18(2).

[16] *See* Schlechtriem, *supra* note 12.

[17] *Id.*

This is not entirely correct. In case of modification or termination, the provisions of the Convention apply beyond contract formation.[18] Article 29 provides:

> (1) *A contract may be modified or terminated by the mere agreement of the parties.*
>
> (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that contract. (Emphasis supplied).

C. Philippine Law on Contract Formation in General

In general, contracts are perfected from the moment that there is a manifestation of the concurrence between the offer and the acceptance with respect to the object and the cause which shall constitute the contract.[19] In particular, a contract of sale is perfected at the moment there is a meeting of minds upon the thing which is the object of the contract and upon the price. From that moment, the parties may reciprocally demand performance, subject to the provisions of law governing the forms of contracts.[20] The Philippine Supreme Court said:

> *Under the Philippine Civil and Commercial Codes, a sale comes into existence upon its perfection by mutual consent even if the subject-matter or the consideration has not been delivered, barring any law or stipulation to the contrary.* It is well settled in our law that a contract of sale exists from the moment one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other to pay therefore a price certain in money or its equivalent. There is perfection of such a contract at the moment there is a meeting of minds upon the thing which is the object of the contract and upon the price, from which moment the parties may reciprocally demand performance, subject to the provisions of the law governing the form of contracts. (Emphasis supplied).[21]

[18] *See* Text of the Speech delivered by Professor Peter Schlectriem at the National University of Singapore 27 (1992).

[19] New Civil Code of the Philippines, R.A. 386, art. 1319, par. 1 (1950). [hereinafter cited as Civil Code]

[20] *Id.*, art. 1475.

[21] *Pacific Oxygen and Acetylene Company v. Central Bank*, 37 SCRA 690 (1971).

III. OFFER

A. Criteria for an Offer

1. APPROACH UNDER THE CONVENTION

Under the Convention, 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.[22]

How would you determine the intention of the offeror to be bound in case of acceptance? The answer is provided by Article 8(3). Accordingly, "if the indications (manifestations) of the proposer justify the addressee in understanding that his acceptance will form a contract, the proposal, if otherwise sufficiently definite, constitutes an offer. xxxxx."[23]

Suppose there was an offer which has a clear gap concerning some allegedly vital element,[24] for example, the offer says nothing about the price of the goods sold and this offer was accepted.[25] Was there a perfected contract of sale?

There is none. In this particular case, the proposal is not sufficiently definite. It did not expressly or implicitly fix or make provision for determining the price. Of course, it would have been different if after the acceptance of the offer, the Seller manufactured and delivered the goods which the Buyer accepted and used.[26] Here, it can be argued that a con-

[22] Convention, art. 14(1).

[23] John E. Murray, Jr., *An Essay on the Formation of Contracts under the United Nations International Sale of Goods*, 8 JOURNAL OF LAW AND COMMERCE 13.

[24] RUDOLF B. SCHLESINGER, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 84. This paper attempts to analyze and resolve some of the factual situations used by Professor Schlesinger and his International Team using the various provisions of the Convention.

[25] *Id.* "Such a gap may disappear after the court has drawn reasonable factual inferences concerning the intentions of the parties. We are not dealing here with such elimination of an apparent gap through truly factual interpretation."

[26] *See* HONNOLD, *supra* note 1 at 200.

tract of sale was validly concluded on the basis of Article 18(3) which provides, *inter alia*, that "the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price" and Article 8(3) which provides that " in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." In case of disagreement as to price, the Court can fill the gap using Article 55 of the Convention:

> 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.

The view of Professor Farnsworth is to the contrary. In the words of Professor Murray:[27]

> Professor Honnold's colleague in UNCITRAL and elsewhere, Professor Farnsworth, views the unstated price problem in Article 14(1) as one of four problems within Part II of CISG that is initially worthy of consideration. Farnsworth points out that the requirement in 14(1), that a proposal will not be sufficiently definite or constitute an offer unless it expressly or implicitly makes provision for determining the price, carries with it what he terms "the unfortunate implication" that such a proposal "is not sufficiently definite unless it does this." The consistent opposition of the United States to this language failed to convince the other delegates to delete it. Farnsworth discovers no solution in Article 55 since that Article becomes operative only after it has been determined that a contract has been validly concluded. He joins others who believe that Article 55 in part III of CISG dealing with the obligations of the parties to an existing contract, was designed for use only where a Contracting State made a declaration under Article 92(1) that it will not be bound by Part II of the Convention. If the non-CISG law of that State found a contract without price to have been "validly concluded" but litigation ensued concerning the obligations of the parties under that contract to which Part III of the CISG, ratified by the Contracting State, would apply, Article 55 of Part III would permit a court to insert the "price generally charged" in such a "validly concluded" contract. It is difficult to quarrel with this analysis of Article 55 since it finds considerable support in what may be called the legislative history of CISG.

[27] *See* Murray, *supra* note 23 at 16. Citations omitted.

2. REFERENCE TO A STANDARD OR MECHANISM

Suppose the terms of the offer do not contain a gap, but for the determination of some element, the offer refers to a standard or mechanism.[28] Four situations may be distinguished:

(a) Reference to a Standard - The offer may define some of its terms by reference to ascertainable objective data (e.g. to a specified set of government statistics) or to an objective standard;[29]

(b) Determination by third person - The offer may provide that one of its terms will be fixed by a third person;[30]

(c) Determination by a party - The offer may provide for the determination of some of its terms by one of the parties;[31]

(d) Reference to future agreement - The offer may provide that at a later time, one of its terms will have to be agreed upon by the parties.[32]

In situations (a), (b), and (c), there could be a concluded contract under the Convention provided that the standard or mechanism assures definiteness and the proposal indicates the intention of the offeror to be bound in case of acceptance. In situation (d), however, the authors entertain some reservations in holding that such constitutes a valid offer. As a matter of fact, in all legal systems, if the offer provides that at a later time

[28] *See* Schlesinger, *supra* note 24 at 87.

[29] *Id.* "Data are objective if their ascertainment does not involve any determination which is made with reference to the particular contract at hand. Standards are objective if the criteria and the methods used to apply them are uninfluenced by the wishes and opinions of the parties."

[30] *Id.* at 88.

[31] *Id.*

[32] *Id.* at 89.

one of its terms will have to be agreed upon by the parties, the courts will usually be highly reluctant to uphold the contract.[33]

3. OFFEROR AND OFFEREE: WHOLLY OR PARTIALLY IDENTICAL

Is it necessary under the Convention that the offer be directed to another person, i.e., whether a proposal lacks the character of an offer if offeror and offeree are wholly or partially identical?[34]

Under the Convention, a contract cannot come into existence if offeror and offeree are wholly identical. Under Article 1(1) of the Convention:

> (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.

Simply put, the Convention requires the transaction to be international, hence, it is inconceivable for the parties to be wholly identical.

In some legal systems, a valid contract may be concluded in case of partial identity of the contracting parties; this means that a contract of A with A and B is valid, if A and B, by virtue of an organization or of a separate fund, constitute an identifiable group.[35] This is so whether or not the group is recognized as a so-called legal entity.[36] Under this view, contracts of a partnership with a partner or of an unincorporated club with a member are valid, even in countries in which a partnership or club is not

[33] *See Id.*. "The parties might agree that they will later negotiate a term in good faith thus attempting to create a duty analogous to that created in American statute law with respect to collective bargaining between employers and appropriate representatives of the employees). In some systems under consideration, when there has been reliance, there is authority indicating at least by analogy that such duty may lead to compensation for reliance losses. In other systems under consideration, even this compensation is in doubt; and in all systems, recovery of the benefit-of-the-bargain is an open question."

When the term "legal systems" is used in this article, it refers to the legal systems subject matter of the study of Professor Schlesinger and his International Team.

[34] *See Id.* at 96.

[35] *Id.* at 97.

[36] *Id.*

(or not for all purposes) recognized as a legal entity separate from its partners or members.[37]

Under the Convention, a valid contract may also be concluded in case of partial identity of the contracting parties provided that their places of business are in different states and under any of the circumstances stated in Article 1(1).

4. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, the offer has to be certain.[38]

The object of every contract must be determinate as to its kind. The fact that the quantity is not determinate shall not be an obstacle to the existence of the contract, provided it is possible to determine the same, without the need of a new contract between the parties.[39] A thing is determinate when it is particularly designated or physically segregated from all others of the same class.[40]

In order that the price may be considered certain, it shall be sufficient that it be so with reference to another thing certain, or that the determination thereof be left to the judgment of a specified person or persons.[41] The fixing of the price can never be left to the discretion of one of the contracting parties. However, if the price fixed by one of the parties is accepted by the other, the sale is perfected.[42] In the case of *Rosenstock v. Burke*,[43] the Supreme Court decided whether or not there was an offer which was certain. In said case, a letter began as follows: " In connection with the yacht Bronzewing, I am in position and am willing to entertain the purchase of it under the following terms . . . "

[37] *Id.* "Whether A individually may contract with a group consisting of A and B, if the group as such has no separate organization of fund (e.g. A and B as owners in common of a house), has not been ascertained since this question seems to be of little practical importance."

[38] Civil Code, art. 1319.

[39] *Id.*, art. 1349.

[40] *Id.*, art. 1460.

[41] *Id.*, art. 1469.

[42] *Id.*, art. 1473.

[43] 46 Phil. 217.

Said the Supreme Court:

> To convey the idea of a resolution to purchase, a man of ordinary intelligence and common culture would use these clear and simple words, I offer to purchase, I want to purchase, I am in position to purchase. And the stronger is the reason why the plaintiff should have expressed his intention in the same way, because, according to the defendant, he was a prosperous and progressive merchant. It must be presumed that a man in his transactions in good faith uses the best means of expressing his mind that his intelligence and culture permit so as to convey and exteriorize his will faithfully and unequivocally. But the plaintiff instead of using in his letter the expression I want to purchase, I offer to purchase, I am in position to purchase, or other similar language of easy and unequivocal meaning, used this other, I am in position and am willing to entertain the purchase of the yacht. The word "entertain" applied to an act does not mean the resolution to perform said act, but simply a position to deliberate for deciding to perform or not to perform said act. *Taking into account only the literal and technical meaning of the word "entertain," it seems to us clear that the letter of the plaintiff cannot be interpreted as a definite offer to purchase the yacht, but simply a position to deliberate whether or not he would purchase the yacht. It was but a mere invitation to a proposal being made to him. which might be accepted by him or not.* (Emphasis supplied)

B. Offer or Invitation to Deal

1. APPROACH UNDER THE CONVENTION

Under Article 14(2) of the Convention, 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.

A mail order catalogue may be sent to specific persons, but the "proposals" in it are not addressed only to those persons, but to anyone who may see the catalogue.[44]

If the person making the proposals has not used apt words making clear his intention, then this involves a question of interpretation which

[44] Barry Nicholas, *The Vienna Convention on International Sales Law*, LAW QUARTERLY REVIEW 203 (1989).

can be resolved by resorting to Articles 7(2), 8(2) and (3), and 9(1) of the Convention.[45]

2. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, advertisements for bidders are simply invitations to make proposals and the advertiser is not bound to accept the highest or lowest bidder, unless the contrary appears.[46] Unless it appears otherwise, business advertisements of things for sale are not definite offers, but mere invitations to make an offer.[47]

C. When Offer Becomes Effective

1. APPROACH UNDER THE CONVENTION

Under the Convention, an offer becomes effective when it reaches the offeree.[48] And under Article 24, 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. Therefore, it can be said that under the Convention, one can be an offeree even before he knows of the offer, *i.e.*, if the offer has become effective when it is delivered to the offeree's business address, mailing address, or habitual residence.

[45] Art. 7(2). Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Art. 8(2). If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Art. 9(1). The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

[46] See Civil Code, art. 1326.

[47] *Id.*, art. 1325.

[48] Convention, art. 18(2).

2. COMMUNICATION OF OFFER NECESSARY

Under the Convention, a proposal, to be effective as an offer, must be intended to be communicated and must in fact be communicated to the offeree. According to Professor Honnold:

> A theme that underlies numerous articles of the Convention is the duty to communicate information needed by the other party - a recognition that the consummation of a sales transaction involves interrelated steps that depend on cooperation.[49]

Although an offer becomes effective when it reaches the offeree, this does not prevent the offeror from making his offer effective at a time later than the moment at which it would otherwise become effective.

3. MANNER IN WHICH OFFER REACHES THE ADDRESSEE

The message, once willingly dispatched by its author, may reach the addressee either in the intended manner of communication or in a different way.[50]

In the first case, the message becomes an effective offer under the Convention. What is required is that the offer be sufficiently definite and indicate the intention of the offeror to be bound in case of acceptance.[51]

If the message reaches the addressee in a different way, its legal consequences can be determined under Articles 7(2), 8(2) and (3), and 9(i) of the Convention.

4. SENDING OF AN IDENTICAL CROSS-OFFER

Suppose the offeror made an offer. Before the offer reaches the offeree, the latter sends an identical cross-offer.[52] What results?

Since the offer is not yet effective, no contract has been concluded. The sending of an identical cross-offer cannot amount to an acceptance

[49] *See* HONNOLD, *supra* note 1 at 154 .

[50] *See* Schlesinger, *supra* note 24 at 104.

[51] Convention, art. 14(1).

[52] *See* Schlesinger, *supra* note 24 at 105.

because technically there is nothing to accept. Nevertheless, resort may be had also to Articles 7(2), 8(2) and (3) and 9(l) of the Convention.

D. Revocability of Offer

1. CIVIL LAW VERSUS COMMON LAW APPROACHES

The revocability of offers is a common example of the perceived differences in contract formation between civil law and the common law.[53] The traditional common law rule is that an offer is revocable, even if it states otherwise, unless the offeree gives the offeror consideration to make the offer irrevocable or to create an option contract.[54] Under civil law, an offer that states a period of time in which the offeree must accept is not revocable. If no such period is stated, the offer is irrevocable during a reasonable acceptance period.[55]

Under the Convention, the general rule is revocability until a contract is concluded.[56] However, an offer cannot be revoked (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable;[57] (b) if it is reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer;[58] and (c) if the revocation reaches the offeree after the offeree has dispatched an acceptance.[59]

Even if the offer is irrevocable, it may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.[60]

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.[61]

[53] Kazuaki Sono, *Restoration of the Rule of Reason in Contract Formation: Has there been Civil Law and Common Law Disparity?*, 21 CORNELL INTERNATIONAL LAW JOURNAL 478.

[54] *Id.*

[55] *Id.*; ZWEIGERT-KOTZ, EIN FHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS 39 (2nd. ed. 1984).

[56] Convention, art. 16 (1).

[57] *Id.*, art. 16(1) (a).

[58] *Id.*, art. (1) (b).

[59] *Id.*, art. 16 (1).

[60] *Id.*, art. 15 (2).

[61] *Id.*, art. 17.

2. NECESSITY OF COMMUNICATION

Under the Convention, the offeror can, by apt words, effectively reserve the power and the right to revoke his offer without any communication.[62]

Suppose the offeror did not expressly reserve the right to revoke without communication.[63] What results?

The offeror cannot revoke the offer without communicating said revocation to the offeree. This would violate the principle of communication which as previously indicated is one of the general principles upon which the Convention is based. However, a different result is possible under Articles 7(2), 8(2) and (3),and 9(1) of the Convention.

3. EFFECTIVITY OF REVOCATION

There is disagreement among the legal systems as to the time at which declared revocation of a revocable offer takes effect so as to deprive the offeree of the power to conclude the contract.[64] In some systems, declared revocation becomes effective at the time when it reaches the offeree.[65] A few require that the revocation come to the offeree's knowledge.[66] In others, it is effective when it is dispatched.[67]

Under the Convention, the applicable provision is Article 24.

4. EFFECT OF SUPERVENING DEATH OR INSANITY

What would be the effect on the offer of the offeror's or the offeree's supervening death or insanity? "Supervening" means occurring after the

[62] *Id.*, art. 6.

[63] *See* Schlesinger, *supra* note 24 at 112.

[64] *Id.* at 114. "On withdrawal of a proposal before it becomes an effective offer, see A-9 and A-10".

[65] *Id.* This is the rule, e.g., in all or almost all common law systems.

[66] *Id.*; Article 91 of the Egyptian Civil Code lays down this rule (which is equally applicable to other declarations of intention); the same article provides, however, that receipt of the declaration raises a rebuttable presumption of knowledge.

[67] *Id.*; Under Italian Law, such revocation is effective even if it never reaches the offeree; but the offeror may be liable for damages.

offeror has declared the offer (i.e. manifested his intention to make the offer), but before the offeree has accepted.[68]

Under the Convention, like all other legal systems, death or insanity terminates the offer if the offer expressly or impliedly so provides.[69]

In all legal systems, where a personal element is involved in the proposed contract, supervening death or insanity of either party will terminate the offer.[70] However, if the proposed contract does not involve a personal element, it is necessary to distinguish between revocable and irrevocable offers.[71] As to irrevocable offers, most legal systems agree that supervening death or insanity of the offeror, if it occurs after the irrevocable offer becomes effective as such, ordinarily does not terminate the offer.[72] The same rules seem to apply in the case of supervening death or insanity of the offeree of an irrevocable offer.[73] As to revocable offers, legal systems are in disagreement. They approach the problem in one of the following ways:

(a) In the majority of systems under consideration (Common Law, French Law, and Italian Law), supervening death or insanity of the offeror or offeree terminates the offer.[74]

(b) In some legal systems under consideration (German Law), supervening death or insanity of offeror or offeree does not terminate the offer.[75]

[68] *Id.* at 116.

[69] *Id.* at 117. The converse problem, whether the offeror has the power by the terms of the offer effectively to provide that supervening death or insanity of either party should not terminate the offer where under the above rules it would be terminated, seems to be of little practical importance, and apparently has received no attention in the legal systems under consideration.

[70] *Id.* at 116.

[71] *Id.*

[72] *Id.*; Section 2-205 of the *American Uniform Commercial Code* introduced a new kind of irrevocable offer. It is not completely certain whether the older authorities, under which irrevocable offers survive supervening death or insanity, will apply to offers made irrevocable by that provision or by similar statutory provisions. A somewhat similar problem exists in French law as to one particular type of irrevocable offer.

[73] *Id.*

[74] *Id.* at 117. The common law systems, however, vary with respect to the requirement of notice.

[75] *Id.*

(c) At least one legal system under consideration, while generally following the rule stated under subd. (a), provides by way of exception that the offer does not terminate if the party in question is an entrepreneur.[76]

In view of the fact that the Convention only applies to contracts of sale of goods,[77] supervening death or insanity of the offeror or offeree does not terminate the offer. However, a different answer is also possible under Articles 7(2), 8(2) and (3) and 9(l) of the Convention.

5. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, an offer becomes ineffective upon the death, civil interdiction, insanity, or insolvency of either party before acceptance is conveyed.[78]

Unlike the Convention, in unilateral offers to buy or sell, since there may be no valid contract[79] without a cause or consideration, the promissor is not bound by his promise and may, accordingly, withdraw it. But, pending notice of his withdrawal, his promise partakes of the nature of an offer to sell which, if accepted, results in a perfected contract of sale.[80]

IV. ACCEPTANCE

A. Manner of Acceptance Under the Convention

Under Article 18(l) of the Convention, acceptance is made either by a statement or other conduct of the offeree indicating assent to an offer.

This provision does not preclude the offeror from specifying a particular means of communicating the acceptance, making it clear by apt

---

76 *Id. See* also Italian Civil Code, arts. 1330, 2082, 2083.

77 Convention, art. 1(1).

78 *See* Civil Code, art. 1323.

79 Civil Code, art. 1324: "When the offeror has allowed the offeree a certain period to accept, the offer may be withdrawn at any time before acceptance by communicating such withdrawal, except when the option is founded upon a consideration, as something paid or promised."

80 *Sanchez v. Rigos* 45 SCRA 368; abandoning the ruling in *Southern Sugar & Molasses Co. v. Atlantic & Pacific Co.* 97 Phil. 249.

words that there will be no contract unless such means is used.[81] In such a case, the use of any other means of communication will be regarded as improper.[82] Article 6 of the Convention permits the parties to exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.

Nevertheless, such improper acceptance may produce legal consequences under the following factual situations:[83]

(a) Upon receiving the acceptance, the offeror promptly indicates approval, *i.e.*, offeror delivers the goods, thus showing he regards himself bound by the contract. Under the Convention, there will be a contract under Article 8(2) whereby statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances;

(b) The improperly communicated acceptance may be regarded as a counter-offer which the original offeror can accept or reject;[84]

(c) The offeror remains silent.[85]

The legal consequences can be determined using Articles 7(2), 8(2) & (3) and 9(l) of the Convention. As to whether or not a contract has been concluded would largely depend on the circumstances of each case.[86]

---

81 *See* Schlesinger, *supra* note 24 at 151.

82 *Id.*

83 *Id.* at 154.

84 *Id.*

85 *Id.*; *i.e.*, the offeror remains silent *vis-a-vis* the offeree. This means that the offeror either does nothing at all, or that he does certain acts relating to the proposed contract without informing the offeree. Due to the dearth of authority in all legal systems, these factual situations are not so extensively analyzed as those in the analogous case of late acceptance.

86 *Id.*

B. Theories of Assent

There are two theories of assent: the objective theory and the subjective theory. Farnsworth has a very helpful discussion on this subject:[87]

> The subjectivists looked to the actual or subjective intentions of the parties. Actual assent to the agreement on the part of both parties was necessary: without it there could be no contract. As it was often expressed there had to be a "meeting of the minds "
>
> *The objectivists on the other hand. looked to the external or objective appearance of the parties' intentions as manifested by their actions.* One of the most influential objectivists, Judge Learned Hand, wrote in a memorable passage:
>
> > A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort.
> >
> > As Hand' s colleague, Judge Jerome Frank, put it, "The objectivists transferred from the field of torts that stubborn anti-subjectivist 'the reasonable man.' *According to the objectivists, a party' s mental assent was not necessary to make a contract. If a party's actions, judged by a standard of reasonableness, manifested an intention to agree, the real but unexpressed state of the party's mind was irrelevant.* As an analyst in the field of torts might view it, that party had through fault induced the other to believe that there was a contract. (Emphasis supplied)

Article 8 of the Convention shows that its approach was a combination of the subjective and objective theory of assent. According to Professor Honnold:

> Paragraph (l) is built on the "subjective approach": Interpretation is to be based on a speaker's intent - but only "where the other party knew or could not have been unaware" of the intent. However, because of the practical barriers to proving identity between the intent of the two parties (particularly when they are involved in a controversy) the problems of interpretation will be governed by paragraph (2) which follows the "objective" approach : Statements by a speaker (Party A) "are to be interpreted according to the understanding that a reasonable person of the same kind as the other party" (Party B) "would have had in the same circumstances."[88]

[87] E. ALLAN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS 168-170. Citations omitted.

C. Approach Under Philippine Law

1. MANNER OF ACCEPTANCE

Under Philippine law, acceptance must be absolute. A qualified acceptance constitutes a counter-offer.[89] Acceptance can be express or implied.[90] It can be made by means of a letter or a telegram.[91] The offeror may fix the time, place, and manner of acceptance.[92]

In the case of *Villonco Realty Company v. Bormaheco*,[93] the Court ruled:

> *It is true that an acceptance may contain a request for certain changes in the terms of the offer and yet be a binding acceptance. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer, whether such request is granted or not, a contract is formed.* (Stuart vs. Franklin Life Insurance Co., 165 Fed. 2nd 965, *citing* Sec. 79, WILLISTON ON CONTRACTS). (Emphasis supplied)

2. INTERPRETATION OF CONTRACTS

Philippine law also follows both the objective and subjective theories of assent. In the interpretation of contracts, if the terms of a contract are clear and leave no doubt about the intention of the contracting parties, the literal meaning of its stipulations shall control. But, if the words appear to be contrary to the evident intention of the parties, the latter shall prevail over the former.[94]

[88] *See* HONNOLD, *supra* note 1 at 164-165.

[89] *See* New Civil Code, art. 1319.

[90] *Id.*, art. 1320.

[91] *Id.*, art. 1319.

[92] *Id.*, art. 1321.

[93] 65 SCRA 365 (1975).

[94] *See* New Civil Code, art. 1370; *Fermin v. CA* 196 SCRA 723 (1991).

In order to judge the intention of the contracting parties, contemporaneous and subsequent acts shall principally be considered.[95]

D. Acceptance by Silence

1. APPROACH UNDER THE CONVENTION

Under the Convention, 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.[96]

Under what circumstances can a contract of sale under the Convention be concluded despite the mere silence or inactivity on the part of the offeree?

The answers are provided by Articles 8(3) and 9(l) of the Convention. Under Articles 8(3) and 9(l), a usage may have the effect that in certain specific situations the offeree is deemed to have assented to the offer unless he rejects it within a certain period. If there have been prior contracts between the offeror and offeree independent of the present transaction, silence of the offeree may be construed as acceptance provided such construction is reasonable in the light of previous practices which the parties have established between themselves.

Suppose the offeror states in the offer that silence will be deemed acceptance. Is this allowed under the Convention?

In all legal systems, the offeror has no power to do this.[97] In other words, if the offeror subsequently asserts that a contract has been concluded by silent acceptance, he may not sustain that assertion by pointing to his own statement (in the offer) that silence will be deemed acceptance.[98]

Under the Convention, the answer can be determined by using Articles 7(2), 8(2) and (3) and 9(1) of the Convention.

[95] *Id.*, art. 1371; *Rojas v. CA* 192 SCRA 709 (1990).

[96] Convention, art. 18(1).

[97] *See* Schlesinger, *supra* note 24 at 138.

[98] *Id.*

2. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, just like the Convention, silence by itself does not amount to acceptance. Of course, the circumstances of each case have to be considered to determine whether or not there has been an implied acceptance.[99]

E. Acceptance by Performance

1. APPROACH UNDER THE CONVENTION

Under the Convention, assent may be indicated by performing an act, such as one relating to the dispatch of the goods or payment of the price.[100]

There is acceptance even if what has been done by the offeree was partial performance. The law merely speaks of "performing an act".

Two problems can arise in connection with partial performance:

(1) whether the partial performance of the offeree deprives the offeror of the power to freely revoke his offer;[101] and

(2) whether the partial performance has the effect of obligating the offeree to complete his performance.[102]

With respect to subdivision (1), a contract of sale is concluded by virtue of partial performance on the part of the offeree. Article 51 states:

> (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 to 50 apply in respect of the part which is missing or which does not conform. (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

[99] *See supra* note 82.

[100] Convention, art. 18(3).

[101] *See* Schlesinger, *supra* note 24 at 143.

[102] *Id.*

Under said Article, the offeror can require full performance on the part of the offeree or declare the contract avoided in its entirety if the partial performance would amount to a fundamental breach of the contract. A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, unless the party in breach did not forsee and a reasonable person of the same kind in the same circumstances would not have foreseen such result.[103]

With respect to subdivision (2), since the remedy of specific performance is available to the offeror, necessarily, the offeree can be compelled to complete performance. Besides, to hold otherwise would run afoul with Article 7(1):

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and *the observance of good faith in international trade*. (Emphasis supplied)

2. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, acceptance can also be manifested by performance and this is considered an "implied acceptance."[104]

F. Acceptance with Modifications

1. APPROACH UNDER THE CONVENTION

Article 19 of the Convention provides:

> (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 materially.

Under the Convention, the acceptance may comply with the offer even though there seems to be a variance, in the following situations:

(a) the wording of the acceptance, but not its meaning, is different from that of the offer;[105]

(b) the acceptance spells out terms which were not expressly stated in the offer, but as a matter of fact were implied in it;[106]

(c) the acceptance spells out terms which were not expressly stated in the offer, but as a matter of law were implied in it.[107]

In addition, the acceptance is valid under the Convention if the offeree purports to accept, but at the same time:

(a) indicates that he is not satisfied with the deal;[108]

(b) expresses some hopes or desires;[109] and

(c) makes an additional proposal which, if assented to by the offerer, would constitute a separate contract.[110]

In all these factual situations, the acceptance does not materially alter the terms of the offer.

---

[103] Convention, art. 25.

[104] *See supra* note 82.

[105] *See* Schlesinger, *supra* note 24 at 125.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

Suppose the offeror, by apt words in the offer, requires, for the formation of a contract, that there be no variance at all, not even the most trivial one.[111] Can this stipulation be enforced?

The answer is yes on the basis of Article 6 of the Convention. Of course, Articles 7(2), 8(2) and (3) and 9(l) of the Convention should also be considered.

G. When Acceptance Becomes Effective

1. APPROACH UNDER THE CONVENTION

Under Article 18(2) of the Convention, an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. Article 24, provides that a declaration of acceptance "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.

Strictly speaking, an acceptance (just like an offer) can be effective even if the offeror has no knowledge of it when it is delivered to his place of business or mailing address or to his habitual residence.

In cases where acceptance is made by performance under Article 18(3) of the Convention, the acceptance is effective at the moment the act is performed.

2. COMMUNICATION OF ACCEPTANCE NECESSARY

Under the Convention, communication of acceptance is necessary to bring about a contract. Under Article 18(2), an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. This implies some sort of communication of acceptance. Besides, under Article 7(2), questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with law applicable by virtue of rules of private international law. As pointed out by Professor Honnold,[112] a theme that underlies numerous articles of the Convention is the duty to communicate information needed by the other party - a recognition that the consummation of a sales transaction involves interrelated steps that depend on cooperation.

[111] *Id.* at 126.

[112] *See supra* note 40.

This is subject to the following exceptions:

(a) Communication may be rendered unnecessary by an express waiver;[113]

(b) Communication may be rendered unnecessary taking into consideration all relevant circumstances of the case pursuant to Article 8(3) of the Convention;

(c) Communication may be rendered unnecessary by trade practices or usages pursuant to Article 9(1) of the Convention; and

(d) Communication is unnecessary in all cases, in which under the circumstances, it would be unreasonable for the offeror to expect communication.[114]

3. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, the acceptance becomes effective at the time when the offeror has knowledge of the acceptance made by the offeree. According to the law,[115] the contract is perfected only from the moment that the offeror has knowledge of the acceptance by the offeree. Acceptance made by letter or telegram does not bind the offeror except from the time it came to his knowledge. The contract, in such a case, is presumed to have been entered into in the place where the offer was made.

It has been said that "there are four different theories which have been advanced to pin-point the exact moment when a contract is per-

[113] *See* Schlesinger, *supra* note 24 at 147. Articles 864 Austrian Civil Code, 6 *Swiss Code of Obligations*, and 98 Egyptian Civil Code do not speak of a possible waiver of communication of acceptance by the offeror. It seems, however, that all relevant cases of such waiver are covered by other exceptions recognized in those codes and based on the nature of the transaction or the circumstances of the case.

[114] *Id.* at 148.

[115] *See* Civil Code, art. 1319 (2).

fected if the acceptance by the offeree is made by means of a letter or telegram. They are:

(1) Manifestation Theory (*manifestacion*) - The contract is perfected from the moment the acceptance is declared or made. This is the theory followed by the Code of Commerce (Art.54, Code of Commerce).

(2) Expedition Theory (*expedicion*) - The contract is perfected from the moment the offeree transmits the notification of acceptance to the offeror, as when the letter is placed in the mailbox. This is the theory followed by the majority of American courts.

(3) Reception Theory (*recepcion*) - The contract is perfected from the moment that the notification is in the hand of the offeror in such a manner that he can, under ordinary conditions, procure the knowledge of its contents, even if he is not able actually to acquire such knowledge by reason of absence, sickness or some other cause. This is the theory followed by the German Civil Code.

(4) Cognition Theory (*cognicion*) - The contract is perfected from the moment the acceptance comes to the knowledge of the offeror. This is the theory followed by the Spanish Civil Code.

In the Philippines, we have adopted the cognition theory."[116]

H. Time Limit for Acceptance

1. APPROACH UNDER THE CONVENTION

Under the Convention, the offeror can fix the time of acceptance.[117] Furthermore, Article 20 provides:

(1) A period of time for acceptance fixed by the offeror in a telegram or 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.

Suppose the offeror did not specify any time limit in the offer,[118] how long will the offer be open?

The offer is open for a reasonable time. Under Article 18(2) of the Convention, 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 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. Suppose an offer is made by telephone, two-way radio, two-way closed circuit television, or similar means of telecommunication.[119] Under Article 18(2), an oral offer must be accepted immediately unless the circumstances indicate otherwise.

2. APPROACH UNDER PHILIPPINE LAW

Under Philippine law, the acceptance has to be made on or before the expiration of the period fixed by the offeror.[120] If there is no period fixed, the acceptance has to be made within reasonable time. When the offeror has allowed the offeree a certain period to accept, the offer may be withdrawn at any time before acceptance by communicating such withdrawal, except when the option is founded upon a consideration, as something paid or promised.[121]

[116] DESIDERIO JURADO, CIVIL LAW REVIEWER 678.

[117] Convention, art. 20(1).

[118] *See* Schlesinger, *supra* note 24 at 168.

[119] *Id.* at 168.

[120] *See Civil Code*, art. 1321.

[121] *See supra* note 72.

I. Late Acceptance

1. APPROACH UNDER THE CONVENTION

Lateness of the acceptance prevents the formation of a contract.[122] An acceptance may be late in the following factual situations:[123]

(a) The offer was received after the expiration of the time limit for acceptance, but the offeree nevertheless accepts.[124]

(b) The offer was received without delay, but was accepted after the expiration of the time limit.[125]

(c) The offer was delayed in transmission, but was still received by the offeree before the expiration of the time limit for acceptance. The acceptance was dispatched before, but, in the ordinary course, was received after the expiration of the time limit.[126]

(d) There was no delay in the transmission of the offer. The acceptance was dispatched within the time limit, but because of delay in transmission it was received by the offeror after the expiration of the period.[127]

The consequences of late acceptance under the Convention are as follows:

(a) If the offeror promptly communicates his approval of the late acceptance to the offeree, the contract is concluded.[128] Under Article 21(1) of the Convention, a late acceptance is

[122] Convention, art. 18 (2); *See also* Schlesinger *supra* note 24 at 169.

[123] *See* Schlesinger, *supra* note 24 at 169. In all the fact situations, unless specified, the offeree may be with or without knowledge of the expiration of the time limit. "Accepts" or "acceptance," in the context of describing these fact situations, may refer to a timely or a late acceptance.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 170; Convention, art. 18(1).

nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(b) If the offeror promptly communicates his disapproval of the late acceptance to the offeree, no contract will be concluded.[129]

(c) The offeror may remain completely silent, *i.e.* there may be no reasonably prompt reaction on his part.[130] In that event, no contract is concluded under the Convention following the general rule on late acceptance unless Articles 8(2) and (3) and 9(1) would apply.

(d) With respect to factual situations (c) and (d), they are expressly governed by Article 21(2) of the Convention:

> If a letter or other writing containing a late acceptance shows that it has been sent under 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.

2. APPROACH UNDER PHILIPPINE LAW

If the offeror has expressly fixed the period of acceptance and the offeree failed to signify his acceptance within the prescribed period, the acceptance of the offeree would be construed merely as a counter-offer.[131]

V. MANIFESTATION OF ASSENT WITHOUT IDENTIFIABLE SEQUENCE OF OFFER AND ACCEPTANCE UNDER THE CONVENTION

There are situations in which the parties manifest mutual assent, but

[129] *Id.*; *See* Convention, art. 18 (2).

[130] *Id.*

[131] EDGARDO PARAS, 4 CIVIL CODE OF THE PHILIPPINES ANNOTATED 447 (2nd ed., 1961).

in which there is no ascertainable sequence of offer and acceptance.[132] This normally occurs in the following situations:

(a) The manifestations of assent by the parties are exchanged simultaneously; *e.g.* each of the contracting parties at the same time signs an identical copy of an identical memorandum in the presence of the other party and delivers it to the other party, or both parties manifest at the same time their assent to terms of a contract suggested by a third person.[133]

(b) Where the manifestations of assent are not simultaneous, it may be impossible, as a matter of fact or evidence, to establish their sequence; *e.g.* when the contract is the result of prolonged face-to-face negotiations, it is usually difficult to ascertain which party made the last counter-offer that was accepted.[134]

(c) Sometimes the parties manifest their assent gradually and over a period of time, *e.g.*, in forming partnerships or joint ventures, or in modifying by their sustained conduct the terms of an existing contract.[135]

(d) Upon the expiration of a contract, the parties often continue to act as if the old contract was still in existence. In such a case, they manifest their mutual intent either to enter into an entirely new contract, or to modify the old one with respect to its duration.[136]

Under the Convention, the parties' manifestation of assent bring about a contract in all of the situations listed above, in spite of the absence of an identifiable offer and acceptance or an ascertainable sequence thereof. After all, under 8(3) of the Convention, in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves and any subsequent conduct of the parties.

[132] *See* Schlesinger, *supra* note 24 at 175.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

VI. FORMAL REQUIREMENTS

A. Approach Under the Convention

Under the Convention, a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.[137]

This does not mean, however, that the parties are barred from agreeing that the contract be reduced in writing or some other formality. As Professor Honnold puts it:

> *Article 11 does not bar the parties from imposing formal requirements. An offeror may require that an acceptance must be in writing; an oral "acceptance" is not an "assent" to the offer.* Such requirements are often contained in offers and are included in some of the General Conditions of Sale prepared by the Economic Commission of Europe. In addition, pursuant to Article 29, the parties by a contract in writing may require "any modification or termination by agreement" to be in writing. A Contracting State, by a Declaration (reservation) under Article 96, may protect its formal requirements from Article 11.[138] (Emphasis supplied.)

Under the Convention, it is possible for the parties, by apt words, to stipulate that the contemplated writing or other formality shall be constitutive, *i.e.* that there will be no contract unless and until the contemplated formality is observed.[139] Under Article 6 of the Convention, the parties may exclude the application of this Convention or, subject to Article 12,

[137] Convention, art. 11.

[138] *See* HONNOLD, *supra* note 1 at 184.

[139] *See* Schlesinger, *supra* note 24 at 178. "The statement in the text is not intended to exclude the possibility that, in some legal systems, the party refusing to execute the writing or other formality, if found guilty of a fault (*culpa in contrahendo*), will be held liable for damages which the other party suffered through reasonable reliance."

derogate from or vary the effect of any of it provisions.[140]

Conversely, a contract will be concluded under the Convention if the parties indicate by apt words that the contemplated writing or other formality shall not be constitutive.[141]

Suppose the parties agree that the contract should be reduced into writing or some other formality would be required without indicating clearly whether such requirement is constitutive or not. What results?

This issue of interpretation can be resolved by resorting to Articles 7(2), 8(2) and (3), and 9(1).

B. Approach Under Philippine Law

Subject to the provisions of the Statute of Frauds and any other applicable statute, a contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.[142]

Under the Statute of Frauds, the sale of real property (regardless of amount) and personal property (if 500 (pesos) or more) shall be in writing to be enforceable.[143] If those sales required to be in writing were orally made, they cannot be enforced by a judicial action, except if they have been completely or partially executed or if the defense of the Statute of Frauds is waived.[144] Sales which are to be performed only after more than one year (from the time the agreement was entered into) -- regardless as to whether the property is real or personal, and regardless of the amount involved -- should also be in writing.[145]

[140] Under Article 96 of the Convention, a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11, Article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State. And under Article 12 of the Convention, any provision of Article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

[141] *Id.*

[142] *See* Civil Code, art. 1483.

[143] *See* 5 PARAS, CIVIL CODE OF THE PHILIPPINES 32-33 *citing* art. 1403 (2).

[144] *See Id., citing* Civil Code, art. 1405; and *Facturan et al. v. Sabanal et al.*, 81 Phil. 512.

CONCLUSION

The Philippines is not among the countries which have adhered to the Convention. In view of the changing international trade environment, it is submitted that the Philippines should now determine whether it would be in its best interest to ratify the Convention by depositing an instrument of adherence with the Secretary General of the United Nations pursuant to Article 91. Unlike the 1964 Hague Conventions (ULIS and ULF), the Convention has worldwide participation and sponsorship. Moreover, "sales contract continues to be regulated by national laws that often differ very much from one another. Serious prejudice to legal certainty is therefore the obvious consequence".[146] Finally, "in international trade, developing countries are exercising an ever more important role. Hence, the necessity to provide rules governing the international sale of goods which, apart from being uniform, also take into account the fact that export or import transactions are often entered into by parties who do not possess equal bargaining power and who operate in very different socio-economic contexts."[147]

[145] *Id.*

[146] *See* BIANCA, *supra* note 2 at 3.

[147] *Id.*